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More Effective Federal Procurement Response to Disasters:
Maximizing the Extraordinary Flexibilities of IDIQ Contracting

By

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I. INTRODUCTION

Federal public procurement practices are constantly under the public microscope. Congress and its investigative arm, the Government Accountability Office (GAO), the media, and watchdog organizations scrutinize how agencies spend hundreds of billions of taxpayer dollars each year.¹ That scrutiny does not recede during national emergencies, whether they are military contingencies or natural disasters. In fact, that scrutiny has by all accounts increased exponentially, particularly with regard to federal procurement for Hurricane Katrina response and reconstruction and the hundreds of billions of dollars spent and yet to be spent. Serious concerns have been raised, and continue to be raised, as to federal agencies' procurement strategies and use of contracting vehicles and tools during emergencies.

The federal procurement system has various vehicles and tools for use preparing for, responding to, and recovering from emergencies. Among these tools is the indefinite delivery-indefinite quantity (IDIQ) contract.² This paper proposes that the multiple

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¹ The U.S. federal government spends approximately \$350 billion annually for goods and services. See Office of Federal Procurement Policy, Office of Management and Budget (OFPP), <http://www.whitehouse.gov/omb/procurement/index.html>.

² See FAR Subpart 16.5. IDIQ contracts go by many names, including delivery order contracts, task order contracts, umbrella agreements, and, internationally, "framework" contracts. They are "used to acquire supplies and/or services when the exact times and/or

award IDIQ contract is the most valuable procurement tool for federal agencies' disaster/crisis response. IDIQ contracts are ideally suited to meet the majority of contracting needs before, during and in the aftermath of a disaster or emergency. Although IDIQ contracts have been in the procurement toolbox for decades, their use exploded with passage of the Federal Acquisition Streamlining Act (FASA)³ in 1994.⁴ Their value has been articulated primarily in terms of administrative efficiency and flexibility, especially because FASA's codification of IDIQ contracts was coupled with other streamlined procurement mechanisms with a goal to make federal procurement more commercial-like and with a significant reduction in government acquisition personnel.⁵ Unfortunately, IDIQ contracting has been plagued by years of abuse and

exact quantities of future deliveries are not known at the time of contract award." FAR 16.501-2. See text and accompanying notes, *infra*, Part III.D, for a description of IDIQ contracts.

³ Pub. L. No. 103-355, 108 Stat. 3243 (1994).

⁴ See U.S. Government Accountability Office, HIGH RISK SERIES-AN UPDATE, Report No. GAO 05-207, at 25 (Jan. 2005) (showing Multiple Award Schedules Sales from 1992-2004). The GSA Multiple Award Schedules alone account for 10-15% of U.S. federal procurement dollars spent, which equates to more than \$32 Billion annually. See also Christopher R. Yukins, Discussion Draft, *Assessing Framework Agreements Under the WTO's Government Procurement Agreement: A Comparative Review of the U.S. Experience*, at 11 n.48 (presenting Federal Procurement Data Center's FEDERAL PROCUREMENT REPORTS for Fiscal Years 2000-2003), available at http://docs.law.gwu.edu/facweb/sschooner/GWU%20Frameworks%20Program%20Materials_Final.pdf.

⁵ See Steven L. Schooner, Feature Comment, *Empty Promise for the Acquisition Workforce*, 47 No. 18 GOV'T CONT. ¶ 203 (May 4, 2005) ("Facing pressure to downsize during the 1990s, Congress pressured agencies to slash procurement professionals, at best deeming 1102s (the Office of Personnel Management's 'contracting series') 'non-core,' or at worst, disparaging them as unnecessary or superfluous 'shoppers.' Without waiting to see if streamlining and increased purchaser discretion would make the existing workforce more *efficient*, reformers traded acquisition personnel for increased purchasing *flexibility*." (emphasis added). See also Karen DaPonte Thornton, *Fine-Tuning Acquisition Reform's Favorite Procurement Vehicle, the Indefinite Delivery Contract*, 31 PUB. CONT. L. J. 383, 384 (2002) (indicating that proponents of IDIQ contracts "defend that red tape reduction and new contracting tools are the only way a reduced acquisition workforce can get the job done on a tight budget").

poor implementation.⁶ Speed and efficiency came at the expense of competition, integrity, and transparency. Amidst the criticism, little has been said of the use of IDIQ contracts where speed and flexibility are necessitated by catastrophic events, not just administrative efficiency and flexibility.

In August 2005, Hurricane Katrina validated the multiple-award IDIQ contract as an essential contractual vehicle for use during and after natural disasters (and other emergencies), not so much by what was done, rather by what was not done. Hurricane Katrina exposed serious shortcomings in federal agencies' logistics and contract planning and execution.

The Department of Defense (DoD) has capitalized for some time now on the benefits of having a single award IDIQ contract in place for logistics and services for use during military contingencies. The Department of the Army's Logistics Civil Augmentation Program (LOGCAP) has successfully provided DoD combat and combat service support of military contingencies since its inception in the late 1980s.⁷ In the wake of military actions since September 11, 2001, LOGCAP grew from a multi-million dollar contract for services during minor contingencies to a multi-billion dollar contract

⁶ See Ralph C. Nash & John Cibinic, *Task and Delivery Order Contracting: Great Concept, Poor Implementation*, 5 NASH & CIBINIC REP. ¶ 30 (May 1998). For a listing of numerous Government Accountability Office (GAO) reports related to task order and delivery order contracting, see <http://acquisition.gov/comp/aap/documents/Sources%20for%20Interagency%20Contracting%20Group.pdf>. See also Department of Defense Inspector General, MULTIPLE AWARD CONTRACTS FOR SERVICES, Report No. D-2001-189 (Sept. 30, 2001), available at <http://www.dodig.osd.mil/audit/reports/fy01/01189sum.htm>.

⁷ See LOGCAP, Who and Where We Are, <http://www.amc.army.mil/LOGCAP/WhoWhere1.html>; see also Donald L. Trautner, *A Personal Account and Perspective of the U.S. Army Logistics Civil Augmentation Program (LOGCAP)*, 2004 Conference of Army Historians, 15 July 2004, available at http://www.amc.army.mil/amc/ho/pdf/History%20Paper_LOGCAP3.pdf (recounting history of LOGCAP and numerous military operations supported by LOGCAP contractor).

in support of major military actions. Over the last five years, the sole LOGCAP contractor, Kellogg Brown and Root (KBR), has come under intense scrutiny for, among other things, alleged overpricing and poor performance. The Army is terminating the current contract and re-competing it as a multiple award contract.⁸

Other federal agencies also have utilized IDIQ contracts as part of their procurement strategies for dealing with emergencies. The United States Army Corps of Engineers (USACE) and the Federal Emergency Management Agency (FEMA) have had IDIQ contracts in place for disaster response. However, the contracts were woefully inadequate for the magnitude of the disaster wreaked across the Gulf Coast by Hurricane Katrina.⁹ This forced FEMA to award four multi-million dollar IDIQ contracts with little or no competition.¹⁰ After extensive criticism, FEMA promised to re-compete the contracts and introduced a "dual-track competitive bidding strategy" for disaster contracting, based on IDIQ contracts for future national emergency response and for post-Katrina Gulf Coast rebuilding.¹¹

⁸ See *infra* notes 130-136 and accompanying text.

⁹ See, e.g., Renae Merle & Griff Witte, *Lack of Contracts Hampered FEMA: Dealing with Disaster on the Fly Proved Costly*, WASH. POST, Oct. 10, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/09/AR2005100901383.html> ("There were contracts in place. But obviously they were not adequate," said Richard L. Skinner, the Homeland Security Department inspector general. "I don't think the contracts in place ever contemplated anything this devastating. . . . They weren't prepared upfront to obtain the products and services they would need.").

¹⁰ The contracts were awarded to The Shaw Group Inc., Bechtel Corp., CH2M Hill Inc. and Fluor Corp. Each was worth \$100 million. See Hope Yen, Associated Press, *Biggest Katrina Contracts Go to Firms in Political Loop*, SEATTLE TIMES, Oct. 20, 2005, available at http://seattlepi.nwsourc.com/national/245182_katrina20.html.

¹¹ Developments, 47 No. 39 GOV'T CONTRACTOR ¶ 440, *FEMA Announces New Contracting Strategy* (Oct 19, 2005); see, e.g., Jonathan Weisman & Griff Witte, *Katrina Contracts will be Reopened: No-Bid Deals Questioned on Hill*, WASH. POST, Oct. 7, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/06/AR2005100600854.html>; Yen, *supra* note 10, at 1 ("FEMA . . . has pledged

In acknowledging the availability of IDIQ contracts and encouraging their use for emergency contracting, commentators take a traditional approach to IDIQ contracts that oversimplifies or would unnecessarily restrict them. The traditional notion is that agencies put advance “umbrella” agreements in place before a disaster and, upon the occurrence of a disaster, agencies have “immediate access to the contractor’s products and services for response and recovery work.”¹² While this is the primary feature of IDIQ contracts, it ignores or overlooks the greater flexibilities inherent in these contract vehicles. They may not be one-size-fits-all vehicles, but properly administered, IDIQ contracts will outpace costlier, less efficient alternatives. This paper presents a broader view of the IDIQ contract in disaster response. It is a vehicle that can flex as necessary to meet the needs and expectations of the public while maintaining its streamlined nature and efficiency.

Section II sets the backdrop, by addressing Hurricane Katrina and its procurement shortcomings in light of the expectations as voiced by Government, media and other

to rebid four contracts worth \$100 million each to politically connected firms -- Shaw Group Inc., Bechtel Corp., CH2M Hill Inc. and Fluor Corp. -- that were awarded with little or no competition. Priority will be given to small and minority-owned businesses.”). Despite the pledge, FEMA officials decided not to re-compete the contracts. However, in March 2006, FEMA awarded 36 new contracts, with a preference given to local, small, and small-disadvantaged businesses, and announced that work performed by the “big four” contractors would transition to the newly awarded contractors. *See* Press Release HQ-06-049, Federal Emergency Management Agency, Small Business Administration Work Together to Award Hurricane Katrina Recovery Contracts to Small and Minority-Owned Businesses (March 31, 2006), *available at* <http://www.fema.gov/news/newsrelease.fema?id=24682>. On August 9, 2006, FEMA awarded six Individual Assistance-Technical Assistance contracts “to provide assistance to applicants of Presidentially-declared disasters and emergencies.” *See* Presolicitation Notice, Solicitation No. HSFEHQ-06-R-0030, posted March 7, 2006, *available at* <http://www.fbo.gov/servlet/Documents/R/487240>.

¹² J. Catherine Kunz, *Pre-Disaster Contracting: The Use of Indefinite-Delivery/Indefinite Quantity Contracts*, 19 No. 22 ANDREWS GOV’T CONT. LITIG. REP. 13, 13 (Feb. 27, 2006).

watchdog overseers of those who spend government funds, even in times of emergency or contingency. In short, section II explains why, practically, multiple award IDIQ contracts are needed. Section III describes the construct in which federal contingency contracting operates by presenting an elegant model of contractual objectives and methods employed across the spectrum of a contingency. Section III also reviews the emergency procurement vehicles and tools available to contracting agencies, primarily those proffered by the newly implemented Federal Acquisition Regulation (FAR) Part 18. Although FAR Part 18 does not proffer anything new, it lays out “specific techniques or procedures that may be used to streamline the standard acquisition process.”¹³ Section III also looks at the Army’s LOGCAP contract and its abrupt change of direction from a single award contract toward a multiple award contract. Finally, Section III turns to IDIQ contracts themselves, highlighting the simple requirements and procedures under which they operate. Section IV then extracts IDIQ contracting from its limited traditional role and applies IDIQ contracts across the entire contingency contracting continuum, demonstrating their effectiveness across the span of an emergency, from the preparation/stand-by phase, through the disaster, to the long-term reconstruction phase. Section IV then discusses the keys to effectively administering IDIQ contracts to maximize their “extraordinary flexibilities” and the benefits of IDIQ contracts and how they satisfy the expectations imposed on the federal agencies. Section V concludes that IDIQ contracts are ideal for emergency response, especially when the contracting agencies engage in meaningful acquisition planning, procure commodities and “commoditized” services, and use simple, open IDIQ contracts.

¹³ FAR 18.000(a).

II. HURRICANE KATRINA

A. *The Storm*

Hurricane Katrina was the costliest, most destructive, and one of the deadliest natural disasters in the history of the United States.¹⁴ Estimates of its devastation have ranged from \$96 billion to over \$200 billion. Hurricane Katrina began as a tropical depression in the Atlantic Ocean over the Bahamas on August 23, 2005.¹⁵ As the storm approached southern Florida, it developed into a cyclone, which was given the name Katrina on August 24.¹⁶ On August 25, Katrina reached Category 1 hurricane status just before it reached land.¹⁷ For some six hours, it crossed Florida, mostly over the Everglades, gradually losing its intensity and becoming a tropical storm.¹⁸ On August 26, Katrina regained its hurricane status as it crossed the warm waters of the Gulf of Mexico. Between August 26-28, Katrina “embarked upon two periods of rapid intensification.”¹⁹ Early on August 27, Katrina became a Category 3 hurricane. Not only had Katrina

¹⁴ See, e.g., Live Science: Forces of Nature, http://www.livescience.com/forcesofnature/ap_050914_worst_disasters.html, (“Hurricane Katrina already has the tragic notoriety of being among the 10 deadliest natural disasters to strike the United States.”); see also Ashbritt, Inc., Comp. Gen. B-297,889, Mar. 20, 2006, 2006 WL 707305 (“Hurricane Katrina . . . is widely described as the most destructive natural disaster in U.S. history.”); WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED (February 2006) at 5, *available at* <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf> (“Hurricane Katrina was the most destructive natural disaster in U.S. history. The overall destruction wrought by Hurricane Katrina, which was both a large and powerful hurricane as well as a catastrophic flood, vastly exceeded that of any other major disaster.”).

¹⁵ See RICHARD D. KNABB, JAMIE R. RHOME, & DANIEL P. BROWN, NATIONAL HURRICANE CENTER, TROPICAL CYCLONE REPORT: HURRICANE KATRINA 23-30 AUGUST 2005 (Dec. 20, 2005) at 1, *available at* http://www.nhc.noaa.gov/ms-word/TCR-AL122005_Katrina.doc.

¹⁶ *Id.* at 2.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 2-3 (defined as a 30 knot or greater intensity increase in a 24-hour period).

intensified in force, but it also doubled in size. Within 12 hours, Katrina grew from a Category 3 hurricane to a Category 5.²⁰ On August 28, Katrina attained its peak intensity, within 200 miles of the mouth of the Mississippi River. As Katrina approached land, it weakened to a Category 3 hurricane.²¹ On August 29, Katrina made landfall in Louisiana. It continued northward, making its final landfall near the mouth of the Pearl River at the Louisiana-Mississippi border. Katrina weakened rapidly as it moved inland over Mississippi, becoming a Category 1 hurricane by the afternoon of August 29, and shortly thereafter becoming a tropical storm.²²

Hurricane Katrina devastated a significant portion of the Gulf Coast of the United States. Most notably, the storm surge caused waters to rise on the Mississippi River and Lake Pontchartrain, which in turn overwhelmed levees protecting New Orleans.²³ Significant levee failures occurred on the 17th Street Canal, Industrial Canal, and London Avenue Canal, and the storm's waters flooded nearly 80 percent of New Orleans.²⁴ Television and print media carried vivid and graphic real-time images of the catastrophic disaster to the world. The plight of victims trapped in their homes, on rooftops, in vehicles, and at the Superdome, in need of food, clothing, shelter, medical attention and evacuation, was broadcast to millions (if not billions) of people. Cries went out from victims as well as sympathizers demanding immediate relief to the victims. The Mayor

²⁰ *Id.* at 3.

²¹ *Id.*

²² *Id.* at 4.

²³ WHITE HOUSE, *supra* note 14, at 6.

²⁴ *Id.*

of New Orleans predicted that tens of thousands of people would be killed.²⁵ The world watched as days passed until relief finally came. Attention then turned to the multi-billion dollar, multiyear recovery and reconstruction effort ahead.

B. Federal Response Under the Microscope

Congressional investigators, agency inspectors general and auditors, the media, and public watchdog groups have monitored and reviewed federal (and state and local) Hurricane Katrina preparation, response and relief and recovery efforts since before the hurricane made landfall.²⁶ Because the government does much of its work by contracting out services and acquiring goods, federal procurement practices are a major part of the

²⁵ See Katrina day-by-day recap, http://www.palmbeachpost.com/storm/content/storm/2005/atlantic/katrina/day_by_day_archive.html. Thankfully, Mayor Nagin's prediction proved to be inflated by a factor of ten.

²⁶ See SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, U.S. HOUSE OF REPRESENTATIVES, A FAILURE OF INITIATIVE (Feb. 15, 2006) at 332 [hereinafter SELECT BIPARTISAN COMMITTEE]:

"The [Department of Homeland Security Inspector General (DHS-IG)] assigned 60 auditors, investigators, and inspectors and hired additional oversight personnel. DHS-IG staff reviewed the award and administration of all major contracts, including those awarded in the initial efforts, and the implementation of the expanded use of government purchase cards. . . . In addition, 13 different agency OIGs have committed hundreds of professionals to the combined oversight effort, with a significant part of the oversight provided by DOD, the various service audit agencies, and criminal investigative organizations. . . . To ensure that any payments made to contractors are proper and reasonable, FEMA has engaged the Defense Contract Audit Agency (DCAA) to help it monitor and oversee payments made and has pledged not to pay on any vouchers until each one is first audited and cleared. In addition, DHS's CPO met with each of the large Katrina contractors to impress upon them the need to ensure all charges are contractually allowable, fair, and reasonable. Finally, the GAO has sent a team to the Gulf coast area to provide an overall accounting of funds across the government and evaluate what worked well and what went wrong at the federal, state and local levels."

intense scrutiny.²⁷ This oversight was, and continues to be, ever more tight in the wake of actual and perceived contracting abuses arising out of U.S. operations in Iraq and Afghanistan and the emergence of the same or similar abuses in the federal response to Hurricane Katrina.²⁸ This scrutiny and criticism is unprecedented and cuts to the core of

²⁷ Government investigations have included work in Congress and elsewhere. *See, e.g.*, SELECT BIPARTISAN COMMITTEE, *supra* note 26 (Two Democratic committee members also issued their own “Additional Views.” at Appendix 9); WHITE HOUSE, *supra* note 14; SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, U.S. SENATE, HURRICANE KATRINA: A NATION STILL UNPREPARED, May 2006, *available at* <http://hsgac.senate.gov/index.cfm?Fuseaction=Links.Katrina> (Numerous Senators issued “Additional Views”). The GAO has issued numerous reports related to Hurricane Katrina preparation, response and recovery, and reconstruction: U.S. Government Accountability Office, PRELIMINARY OBSERVATIONS REGARDING PREPAREDNESS AND RESPONSE TO HURRICANES KATRINA AND RITA, Report No. GAO-06-365R (Feb. 1, 2006); AGENCY MANAGEMENT OF CONTRACTORS RESPONDING TO HURRICANES KATRINA AND RITA, Report No. GAO-06-461R (Mar. 16, 2006); HURRICANE KATRINA: PLANNING FOR AND MANAGEMENT OF FEDERAL DISASTER RECOVERY CONTRACTS, Report No. GAO-06-622T (Apr. 10, 2006) (Testimony of William T. Woods, Director, Acquisition and Sourcing Management); HURRICANES KATRINA AND RITA: CONTRACTING FOR RESPONSE AND RECOVERY EFFORTS, Report No. GAO-06-235 (Nov. 2, 2005) (statement of David E. Cooper, Director, Acquisition and Sourcing Management); HURRICANE KATRINA: IMPROVING FEDERAL CONTRACTING PRACTICES IN DISASTER RECOVERY OPERATIONS, Report No. GAO-06-714T (May 4, 2006) (Statement of William E. Woods). *See also* Department of Homeland Security Office of the Inspector General, A PERFORMANCE REVIEW OF FEMA’S DISASTER MANAGEMENT ACTIVITIES IN RESPONSE TO HURRICANE KATRINA Report No. OIG-06-32 (Mar. 2006), *available at* http://www.dhs.gov/interweb/assetlibrary/OIG_06-32_Mar06.pdf. A number of government watchdog organizations also maintain websites monitoring government contracting with sections dedicated to Hurricane Katrina-related contracting, including Corpwatch.org (CorpWatch: Holding Corporations Accountable), Halliburtonwatch.org (Halliburton Watch), pogo.org (Project on Government Oversight), publicintegrity.org (The Center for Public Integrity) and www.taxpayer.net/budget/katrinaspending/contracts/index.htm (Taxpayers for Common Sense).

The House Select Committee’s report suggests that “[t]he intense public scrutiny could limit the willingness of private sector companies to offer assistance during future disasters. Several firms expressed the view that the challenges associated with emergency contracting may not be worth the trouble. Finally, unfounded negative publicity harms company reputations.” SELECT BIPARTISAN COMMITTEE, *supra* note 26, at 337.

²⁸ *See* Oliver Morgan, *Congress Probes Hurricane Clean Up Contracts*, THE OBSERVER (Sept. 11, 2005), *available at* <http://observer.guardian.co.uk/business/story/0,6903,1567081,00.html> (quoting Congressional Representative Henry Waxman in tying

the contracting effort. According to a Congressional investigation, federal agencies operated under “fundamentally flawed contracting strategies.”²⁹ Watchdog organizations accused contracting parties of “disaster profiteering,”³⁰ akin to what critics allege was “war profiteering” in Iraq and Afghanistan.³¹

The investigations, reports and articles authored by the various observers emphasize several “expectations” of federal government contracting during and after disasters. They include disaster preparation and planning and having advance contracts in place before a disaster occurs; quick response by the contracting agencies to identified needs; the procurement of quality goods or services procured at reasonable prices; the absence of cronyism or favoritism in awarding contracts; socioeconomic preferences for small businesses, small-disadvantaged businesses, and local businesses; and transparency of contract and order notice and award. Although in many respects the government response to Katrina was laudable, government agencies failed to meet these expectations. These are not novel expectations nor are they outrageous. In fact, the Federal Acquisition

Katrina contracting to Iraq contracting: “The administration has an abysmal contracting record in Iraq. We can't afford to make the same mistakes again. We must make sure taxpayer funds are not wasted, because every dollar thrown away today is a dollar that is not available to hurricane victims and their families.”). *See, e.g.,* Seattle Times News Service, *Katrina contracts worth billions raise worries about waste*, SEATTLE TIMES (Sept. 20, 2005), available at http://seattletimes.nwsourc.com/html/nationworld/2002527650_canecontracts29.html; Pratap Chatterjee, *Big, Easy Iraqi-Style Contracts Flood New Orleans*, CORPWATCH (Sept. 20, 2005), available at <http://www.corpwatch.org/article.php?id=12647>.

²⁹ UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON GOVERNMENT REFORM-MINORITY STAFF SPECIAL INVESTIGATIONS DIVISION THE BUSH ADMINISTRATION RECORD: THE RECONSTRUCTION OF IRAQ, Oct. 18, 2005, at 8.

³⁰ *See, e.g.,* Charlie Cray, *Disaster Profiteering: The Flood of Crony Contracting Following Hurricane Katrina*, MULTINAT'L MONITOR, Sept./Oct., Vol 26, Numbers 9 & 10, available at <http://multinationalmonitor.org/mm2005/092005/cray.html> (referring to comments of the Project on Government Oversight (POGO) Director).

³¹ *See, e.g.,* Center for Media and Democracy's Source Watch, http://www.sourcewatch.org/index.php?title=War_profiteering#Profiteering.

Regulation (FAR) codifies most of them. These oversight bodies demand adherence to these provisions and less use of available exceptions (e.g., limited competition, sole-source “no-bid” awards). In the case of transparency, however, they demand more transparency than that contemplated by the FAR. The question then becomes what contracting vehicle(s) best address these expectations? And the answer is multiple award IDIQ contracts.

1. Advance Planning and Preparation

Advance planning is generally essential to a well-executed mission, in this case disaster response. Acquisition planning is a key element of the broader, all-encompassing advance planning.³² After all, the government does not have all the goods and resources it needs and is not able to perform all the services itself. FAR Part 7 mandates that agencies “perform acquisition planning and conduct market research for *all* acquisitions.”³³

The government should plan and be prepared for contingencies, knowing what goods and services will be needed and have advance contracts in place to facilitate quick acquisition and delivery at “better” prices.³⁴ With regard to Hurricane Katrina, the GAO found there was “inadequate planning and preparation to anticipate requirements for

³² FAR Part 7 “prescribes policies and procedures for—(a) Development of acquisition plans [and] (b) Determining whether to use commercial or Government resources for acquisition of supplies or services.” FAR 7.000.

³³ FAR 7.102(a) (emphasis added).

³⁴ See SELECT BIPARTISAN COMMITTEE, *supra* note 26, at 329-332; Renae Merle & Griff Witte, *supra* note 9, at A01; Eric Lipton & Ron Nixon, *Many Contracts for Storm Work Raise Questions*, N.Y. TIMES (Sept. 26, 2005), available at <http://www.nytimes.com/2005/09/26/national/nationalspecial/26spend.html?ex=1285387200&en=16d1c769d54e8c3c&ei=5088&partner=rssnyt&emc=rss>.

needed goods and services.”³⁵ Although contracts were “in place” prior to Katrina, they were insufficient in breadth and amount of goods and services and contracting personnel were unprepared to use them.³⁶

The lack of corpse recovery services in Louisiana and the purchase of temporary classrooms for schools in Mississippi are illustrative of the lack of planning and knowledge on the part of government procurement officials. In the hurricane’s aftermath, hundreds of corpses lay decomposing in the homes and streets across Louisiana and Mississippi.³⁷ Louisiana state and local officials bickered with Federal Emergency Management Agency (FEMA) officials over which agency’s responsibility it was to recover the bodies. FEMA had made no arrangements because historically cities and localities recovered bodies from mass casualties.³⁸ One week after the storm struck, FEMA entered a verbal agreement with Kenyon International Emergency Services Inc. to recover the bodies, but difficulties finalizing the arrangement hindered recovery efforts.³⁹ Kenyon officials complained of a “bureaucratic quagmire” and withdrew from the agreement.⁴⁰ FEMA requested the Department of Defense (DoD) to take over recovery efforts until a new contractor could be found. More than two weeks after hurricane landfall, the Louisiana Department of Health and Hospitals signed its own written

³⁵ U.S. GAO, Report No. GAO-06-461R, *supra* note 27, at 4.

³⁶ *See* Merle & Witte, *supra* note 9, at A01.

³⁷ Merle & Witte, *supra* note 9, at A01. The majority lay in the ravaged New Orleans area. *Id.*

³⁸ *Id.*

³⁹ WHITE HOUSE, *supra* note 14, at 48.

⁴⁰ *See id.*; Merle & Witte, *supra* note 9, at A01.

contract with Kenyon.⁴¹ Clearly, federal and state agencies had not planned for corpse removal and were not prepared to quickly address it when the need arose.

Two weeks after the hurricane, the Mississippi Emergency Management Agency asked FEMA to provide temporary classrooms for Mississippi schools destroyed by the hurricane. FEMA delegated this requirement to the USACE with a very short time frame.⁴² In an investigation initiated by a call to its Fraud Hotline, the GAO found

[USACE] contracting officials did not expect to be buying classrooms and, in fact, were not assigned the task until after Hurricane Katrina had struck. With no prior experience, no advance notice, and the need to buy the classrooms as quickly as possible, [USACE] contracting officials lacked knowledge of the industry and information about classroom suppliers, inventories, and prices that would have been useful in negotiating a good deal. Faced with the urgent need for classrooms, they chose to purchase them by placing an order, noncompetitively, on an existing agreement with Akima.

Based on our analysis of a price quote obtained by Akima from a local Mississippi classroom supplier, the price that Akima actually paid for the classrooms, and prices for similar units from GSA Schedule contracts, we believe [USACE] could have, but failed to, negotiate lower prices.⁴³

Federal agencies' inadequate planning contributed to hasty procurement decisions that resulted not only in significantly higher prices,⁴⁴ but also resulted in the procurement of unnecessary goods or services, such as 4,000 base camp beds that

⁴¹ WHITE HOUSE, *supra* note 14, at 48 (acting at the direction of Louisiana Governor Kathleen Blanco, "even though the Governor believed that 'recovery of bodies is a FEMA responsibility'").

⁴² U.S. Government Accountability Office, HURRICANE KATRINA: ARMY CORPS OF ENGINEERS CONTRACT FOR MISSISSIPPI CLASSROOMS, Report GAO-06-454 (May 2006), at 2.

⁴³ *Id.* at 4-5.

⁴⁴ The classrooms contract with Akima was nearly double the price of other quotes. Although there was concern as to whether the other contractors could have provided the number of classrooms requested within the time frame, USACE could have negotiated a lower price. *See id.*

were never used,⁴⁵ and the “wrong” goods, such as 10,000 manufactured homes now stored and maintained at the Hope, Arkansas municipal airport.⁴⁶

2. Quick Response

Whether the government is directly providing the goods or services or procuring them, the public demands a quick response of emergency supplies and services during a crisis or disaster. In a CBS News Poll conducted within two weeks after Katrina, 77% of respondents believed the federal government’s response to Katrina was inadequate and 80% believed that the government did not respond as fast as it could have.⁴⁷ As noted above, the quick response must not be hasty. In the absence of advance planning, hurried agency actions led to the wasting of millions of dollars in the Katrina response.⁴⁸

3. Quality Products/Services at Reasonable Prices

The federal government is expected to meet its needs immediately through responsible contracting at “fair and reasonable” prices. This is true of all contracts

⁴⁵ U.S. GAO, Report No. GAO-06-461R, *supra* note 27, at 4.

⁴⁶ Developments, *Senate Holds Field Hearing in Arkansas On \$431 Million In Unused FEMA Housing*. 48 GOV’T CONTRACTOR ¶151 (Apr. 26, 2006). The homes have “no apparent destination, . . . a symbol of FEMA’s failures in responding to the Gulf Coast crisis.” *Id.* According to the Department of Homeland Security Inspector General, “not only did FEMA over-purchase manufactured homes, but the agency also purchased the wrong type of homes.” *Id.* As a result, FEMA is paying \$47 million for their storage and maintenance. *Id.*

⁴⁷ See CBS News Polls Poll: Katrina Response Inadequate: Public Says Response To Katrina Too Slow; Confidence In Bush Drops (Sept. 8, 2005), <http://www.cbsnews.com/stories/2005/09/08/opinion/polls/main824591.shtml>. See also United Press International, *FEMA Promises Strong Texas Response*, 9/21/2005 3:14:09 PM, (“The Federal Emergency Management Agency, blistered by critics for its slow response to Hurricane Katrina, pledged quick help as Hurricane Rita neared Texas.”), available at http://www.wpmi.com/weather/story.aspx?content_id=5EE82DD3-68BB-46AC-B79E-F21C1E3064B4.

⁴⁸ See MSNBC Staff and News Service Report, *Audits: Millions of Dollars in Katrina Aid Wasted*, <http://www.msnbc.msn.com/id/11326973> (citing GAO and DHS Inspector General audits).

regardless of how much competition was involved. FEMA's Mississippi classrooms purchase not only disclosed deficiencies in planning and knowledge of needed goods and services, it also raised concerns of "inflated" prices. The *New York Times* reported: "[T]he classrooms cost FEMA nearly \$90,000 each, including transportation That is double the wholesale price and nearly 60 percent higher than the price offered by two small Mississippi businesses dropped from the deal."⁴⁹ Akima (the company awarded the contract) officials denied any "price gouging" on their part, claiming "[t]he speed demanded in installing the classrooms required charging a premium. . . . What we provided to the government was a fair and reasonable cost given the emergency conditions and the risks."⁵⁰ Notwithstanding the assertions, GAO believes USACE could have negotiated lower prices.

FEMA's \$236 million contract with Carnival Cruise Lines to house 7,000 people in three cruise liners also underwent extensive and intense public scrutiny.⁵¹ A Senate Federal Financial Management Subcommittee's investigation into the contract concluded, "taxpayers [would] end up paying four times the amount, per person, that vacation cruise

⁴⁹ Eric Lipton, *No-Bid Contract to Replace Schools After Katrina Is Faulted*, N.Y. TIMES (Nov. 11, 2005), available at http://www.nytimes.com/2005/11/11/national/national_special/11schools.html?pagewanted=1&ei=5088&en=de07832920fd542f&ex=1289365200&partner=rssnyt&emc=rss.

⁵⁰ *Id.*; cf. James Glanz, *Army to Pay Halliburton Unit Most Costs Disputed by Audit*, N.Y. TIMES (Feb. 27, 2006) (Army "largely accepted Kellogg Brown & Root's assertions that costs had been driven up by factors beyond its control — the exigencies of war and the hard-line negotiating stance of the state-owned Kuwait Petroleum Corporation."), available at <http://www.nytimes.com/2006/02/27/international/middleeast/27contract.html?ex=1298696400&en=075a4c9d410f6860&ei=5088&partner=rssnyt&emc=rss>.

⁵¹ See, e.g., Charlie Cray, *supra* note 30, at 4. Perhaps more disturbing than the price is that Greece offered the use of two cruise ships at no cost to the United States.

passengers would pay, although Carnival's overhead costs [were] far lower than during normal cruises."⁵²

Reasonable prices are generally assured through adequate competition; without that competition, the government may have to look to other factors to determine price reasonableness, including a contractor's cost or pricing data.⁵³ When the government engages in sole or limited source procurement, the public legitimately questions whether such prices are too high. The public also wants to see less "no-bid" (sole source) contracting. Even though all contracts require the contracting officer to make a price reasonableness determination, it is unlikely to affect the award, or absent fraud, to affect the contract price.

4. Absence of Cronyism

Procurement regulations demand integrity of the federal procurement system's participants.⁵⁴ Sole source and limited competition contracts are blemished with the perception of "cronyism," although competitively awarded contracts are not immune to such charges.⁵⁵ Any hint of favoritism to politically connected individuals or companies-

⁵² *Id.* But see SELECT BIPARTISAN COMMITTEE, *supra* note 26, at 336-37 (Carnival Cruise Lines executives responding that "to make the ships available, Carnival canceled approximately 100,000 existing reservations for which travel agent fees still had to be paid. Carnival makes its profit from ticket sales and 'add-ons' (drinks, shore excursions, etc.) and not in the 'time charter' business, which is a comprehensive package of food, beverages, and activities. In addition, it incorporated taxes into its offer, which will be refunded if it is determined it does not owe taxes under U.S. law.").

⁵³ See FAR Subpart 15.4.

⁵⁴ See *e.g.*, Procurement Integrity Act, 41 USC § 423 (implemented at FAR 3.104-1 *et seq.*).

⁵⁵ See, *e.g.*, Charlie Cray, *supra* note 30 ("[A] series of exemptions to competitive bidding and other procurement requirements adopted by the Federal Emergency Management Agency (FEMA) and the Army Corps of Engineers has effectively turned the Gulf region reconstruction and cleanup contracts into a *feeding frenzy* for 'disaster

-even worse, if coupled with perceived overpayment or “excessive profit”⁵⁶--may erode the public trust and confidence that the right actions are being taken for the right reasons, even if the allegations are misleading or baseless.⁵⁷ Allegations of cronyism have enveloped the entire post-Katrina recovery effort. In October 2005, the *Washington Post* reported that billions of dollars in government contracts were going to large, out-of-state, “politically-connected” businesses, while “Gulf firms” were losing cleanup contracts.⁵⁸ The *New York Times* noted in a story about the Mississippi classrooms purchase that Akima’s majority owner was “represented in Washington by a lobbying firm with close ties to the Bush administration and particularly Tom Ridge, the former head of the Department of Homeland Security.”⁵⁹ The media and watchdog groups are not the only ones alleging “cronyism.” Members of Congress are also making these charges. For example, Congressional Representative Barbara Lee, D-California, stated: “The aftermath of Hurricane Katrina demonstrated the tragic consequences of having an

profiteers’--a network of crony contractors for whom the \$200 billion cleanup and reconstruction promises to be a significant windfall.” (emphasis added)).

⁵⁶ See *Cashing In On The Katrina Cleanup: Why the Army Is About To Hand An Indian Tribe An Enormous No-Bid Contract*, BUSINESSWEEK ONLINE (April 10, 2006), available at http://www.businessweek.com/magazine/content/06_15/b3979071.htm (noting that estimates for AshBritt’s profit margin could be as much as 25%).

⁵⁷ An example of misleading allegations is where the press notes that contracts are going to companies with “preexisting relationships” and infer cronyism. See, e.g., Associated Press, *Auditors Keep Watch Over Katrina Contracts*, available at <http://www.foxnews.com/story/0,2933,170182,00.html>.

⁵⁸ See Griff Witte et al., *Gulf Firms Losing Cleanup Contracts: Most Money Going Outside Storm’s Path*, WASH. POST (Oct. 4, 2005), at D01, available at <http://www.washingtonpost.com/wpdyn/content/article/2005/10/03/AR2005100301691.html> (“Companies outside the three states most affected by Hurricane Katrina have received more than 90 percent of the money from prime federal contracts for recovery and reconstruction of the Gulf Coast, according to an analysis of available government data.”).

⁵⁹ Eric Lipton, *supra* note 49, at 1. Akima’s president denied that Akima or its parent company “used any ties to elected officials to pursue contracts.” *Id.*

administration where *cronyism trumps competence*,”⁶⁰ and Representative Bernie Thompson, D-Mississippi, stated: “The few minority contracts awarded in the initial weeks were given to Republican *cronies* from outside the region.”⁶¹

5. The “Right” Contractor

Federal procurement law provides preferences for certain “concerns,” such as small businesses,⁶² minority-owned businesses,⁶³ and in times of disaster or emergency, local businesses.⁶⁴ These three concerns have garnered significant attention by the media, the business community, and Congress with regard to Katrina-related contracts. In the immediate aftermath of Hurricane Katrina, many of the contracts went to out-of-state companies much to the chagrin and detriment of “local” businesses.⁶⁵ Even though these out-of-state companies employed local businesses as subcontractors, critics claimed the prime contractors earned substantial profits while the subcontractors were working for little more than cost.⁶⁶

⁶⁰ See, e.g., Charlie Cray, *supra* note 30 (emphasis added).

⁶¹ *Id.* (emphasis added).

⁶² 15 U.S.C. § 631.

⁶³ Pub. L. No. 95-507 (1978).

⁶⁴ Stafford Act, Pub. L. No. 93-288, 88 Stat. 143 (1944), codified at 42 U.S.C. § 5121 *et seq.* [hereinafter Stafford Act].

⁶⁵ See Griff Witte et al., *supra* note 58, at D01; see also SELECT BIPARTISAN COMMITTEE, *supra* note 26, at 331 (stating that some local companies went out of business. It is unclear whether the Committee attributes this to the failure to hire local businesses or a statement of fact as to why they weren’t used.).

⁶⁶ See *Cashing In On The Katrina Cleanup*, *supra* note 56, at 1; see also Larry Margasak, *Storm Contractors Found to Cleanup in Scams*, HOUSTON CHRONICLE (May 5, 2006), available at <http://www.chron.com/cs/cda/printstory.mpl/nation/3841969>.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act⁶⁷ grants a preference to local businesses for contracts for assistance after major disasters or emergencies.⁶⁸

In the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities which may be carried out by contract or agreement with private organizations, firms, or individuals, preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency.⁶⁹

Although statutory, the Stafford Act preference had no regulatory implementation. It had been used infrequently since it was passed and had not acquired as much attention.

Federal agencies were unsure how to implement the Act. In a post-Katrina investigation, the GAO reported that:

Preparation was . . . lacking in implementation of the Stafford Act preference for contractors residing or doing business in the affected area. USACE staff expressed uncertainty regarding how to apply preferences or determine if a company was in an affected area. Several General Services Administration (GSA) and FEMA officials indicated they were aware of the Stafford Act but stated it is difficult to immediately factor in local businesses in such a catastrophic event.⁷⁰

The House of Representatives Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina (House Select Bipartisan Committee) report echoed the GAO's findings.⁷¹

⁶⁷ 42 U.S.C. § 5150.

⁶⁸ Application of the Act is contingent upon Presidential declaration of a disaster or emergency. *See* FAR 18.203.

⁶⁹ 42 U.S.C. § 5150.

⁷⁰ *See* U.S. GAO, Report GAO-06-461R, *supra* note 27, at 2.

⁷¹ *See* SELECT BIPARTISAN COMMITTEE, *supra* note 26, at 333. ("Ambiguous statutory guidance regarding local contractor participation led to ongoing disputes over procuring debris removal and other services." The Committee concluded, "Ambiguities regarding the implementation of local contractor preference under the Stafford Act should be

The most prominent Stafford Act case involved a USACE contract for debris removal in Mississippi. USACE “activated a previously awarded contract” to AshBritt to immediately begin helping in the Mississippi cleanup.⁷² The initial response estimates were too low and the advance contract was not sufficient so USACE held a competition for a new contractor; AshBritt won the nearly \$1 billion contract.⁷³ Numerous complaints were made regarding the award of this contract to a non-Mississippi firm, including one from “a member of the Mississippi congressional delegation urg[ing] the Secretary of the Department of Homeland Security to follow the requirement of the Stafford Act and ‘redirect’ the cleanup contracts in Mississippi and Louisiana to local firms.”⁷⁴ Two months later, USACE issued a new solicitation for cleanup services. The solicitation limited the competition to Mississippi firms. AshBritt protested on the ground that the Stafford Act did not include the authority to use a set-aside.⁷⁵ The GAO denied the protest. In 2006, Congress added the following sentence to Section 5150: “In carrying out this section, a contract or agreement may be set aside for award based on a specific geographic area.”⁷⁶ Representative Chip Pickering, sponsor of the amendment, emphasized the importance of local contractor involvement: “Congress wrote the Stafford Act to maximize the impact of federal dollars by giving preference to local

resolved. In addition, clear, unambiguous remedies and penalties for failure to meet such statutorily mandated preferences may need to be considered.”).

⁷² See AshBritt, Comp. Gen. B-297889, Mar. 20, 2006, 2006 WL 707305 (The contract had a ceiling of \$500 million with an option for an additional \$500 million.).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* (arguing that without express authority set-aside violates the CICA).

⁷⁶ Pub. L. No. 109-218, § 2.

contractors, strengthening the damaged economy and providing jobs to communities and victims of the disaster.”⁷⁷

In October 2005, FEMA claimed that 72% of its contracting dollars were spent on small businesses.⁷⁸ Nevertheless, there was (and continues to be) a perception that small businesses were being “frozen” out of the process.⁷⁹ Over time the number of contracts awarded to small businesses and minority-owned businesses has increased, with promises of more to come.⁸⁰ However, the percentages were still well below what critics demand and what is “normally required.”⁸¹

FEMA further responded to the pressures for local and small business participation through its October 2005 “dual-track strategy.” As part its strategy, FEMA increased participation of local businesses in the Gulf Coast reconstruction.⁸² FEMA recently awarded 36 Gulf recovery contracts worth hundreds of millions of dollars

⁷⁷ SELECT BIPARTISAN COMMITTEE, *supra* note 26, at 335 (“Mississippians have the ability, capacity and personal incentive to do this work. We want to rebuild and restore our home state, and these federal contracts will help our economy more through local contractors than sending the money to out-of-state corporations.”).

⁷⁸ See, e.g., Ethan Butterfield, *Velásquez: Small Business Frozen Out of Katrina Rebuilding*, WASH. TECH. (Oct. 20, 2005), available at http://www.washingtontechnology.com/news/1_1/Small_Business/27235-1.html.

⁷⁹ *Id.*

⁸⁰ See Associated Press, *Katrina: FEMA breaks promise on Katrina Contracts* (Mar. 25, 2006), available at <http://www.corpwatch.org/article.php?id=13414> (“Since October, the percentage of FEMA contracts given to minority-owned businesses has increased slightly, from 1.5 percent to 2.4 percent of the \$5.1 billion awarded.”).

⁸¹ See, e.g., The Associated Press, *Minority Firms Getting Few Katrina Contracts: Most Awards Going to Businesses with an Existing Government Relationship* (Oct. 4, 2005), available at <http://www.msnbc.msn.com/id/9590752> (noting that “about 1.5 percent of the \$1.6 billion awarded by [FEMA] has gone to minority businesses, less than a third of the 5 percent normally required.”).

⁸² See Press Release, FEMA, *FEMA, Small Business Administration Work Together to Award Hurricane Katrina Recovery Contracts to Small and Minority-Owned Businesses* (Mar. 31, 2006), available at <http://www.fema.gov/news/newsrelease.fema?id=24682>.

primarily to local, small and small-disadvantaged businesses.⁸³ The House Select

Committee observed:

Through this strategy, FEMA hopes to provide a diverse group of companies the opportunity to contract with FEMA for the Gulf coast hurricane recovery by adding prime contracting opportunities for small disadvantaged businesses with a geographic preference for those located in the Gulf states. The national competition approach is intended to preserve subcontracting goals and opportunities for small and disadvantaged businesses as part of all prime contracts for future disasters. Both strategies will emphasize the importance of using local businesses, a *critical piece of a successful economic recovery in a disaster-ravaged area*.⁸⁴

FEMA also awarded six nationwide Individual Assistance-Technical Assistance contracts with local company, small business, minority-owned business subcontractor requirements.⁸⁵

6. Transparency

The public wants to know what the government is buying, from whom and for how much. However, public notice requirements are generally lowered during contingencies or when there is an urgent or compelling reason.⁸⁶ Additionally, notice of orders and awards under IDIQ contracts is not required.⁸⁷ The media played a pivotal role in securing transparency into the government's Katrina-related expenditures.⁸⁸ Agencies such as FEMA and USACE responded to their demands by using the Internet to

⁸³ See Press Release, *supra* note 11.

⁸⁴ SELECT BIPARTISAN COMMITTEE, *supra* note 26, at 335 (emphasis added).

⁸⁵ See *supra* note 11.

⁸⁶ See, e.g., FAR 5.202.

⁸⁷ See FAR 16.505.

⁸⁸ See Christopher R. Yukins, *Hurricane Katrina Brings Transparency to Task-Order Contracting*, in GOVERNMENT CONTRACTING IN A "NEW" ERA: FLEXIBILITIES, CONSTRAINTS AND REALITIES, ABA PUBLIC CONTRACT LAW SECTION'S 12TH ANNUAL FEDERAL PROCUREMENT INSTITUTE (Mar. 2-3, 2006), Vol. I, Tab R.

announce prime contracts and some of the orders issued under them.⁸⁹ We can safely assume that such demands will continue.

III. FEDERAL GOVERNMENT CONTRACTING DURING EMERGENCIES

Experience suggests a few more certainties in life than death and taxes. The country will face emergencies or other contingencies, man-made and natural, and the government will spend money (purchase goods and services) in response to them. Federal procurement regulations anticipate that there will be situations where expedited, immediate procurement actions are necessary. In the last decade or so, the system has adopted more “efficient” and “streamlined” ways of procuring goods and services that do not have to be triggered by an emergency situation, but are effective tools when one presents itself.⁹⁰ This section reviews the conceptual construct within which the federal contracting agencies operate during a contingency. This model was presented recently at the Annapolis meeting of the American Bar Association’s Public Contract Law Section’s 12th Annual Federal Procurement Institute by Jeffery Alan Green, a House staffer with extensive experience in contingency contracting.⁹¹ This section then turns to the various contractual tools and vehicles available when contingencies and other emergencies arise that can be used within that construct. The section below then discusses the Army’s

⁸⁹ *Id.*

⁹⁰ See FAR Part 18.

⁹¹ Jeffery Alan Green, *The Defense Contracting Type Continuum: From Full and Open Competition to Sole Source and Back Again*, in GOVERNMENT CONTRACTING IN A “NEW” ERA: FLEXIBILITIES, CONSTRAINTS AND REALITIES, ABA PUBLIC CONTRACT LAW SECTION’S 12TH ANNUAL FEDERAL PROCUREMENT INSTITUTE (Mar. 2-3, 2006) at Vol. I, Tab Q.

LOGCAP contract and its abrupt shift to a multiple award IDIQ after nearly two decades with only one contractor. This section concludes with review of the IDIQ contract itself.

A. The Concept: Defense Type Contracting Continuum

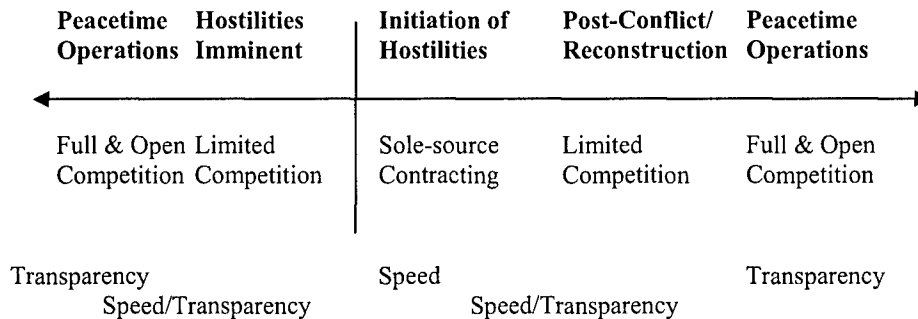
Contracting agencies whose missions include disaster or emergency response, including natural disasters and military contingencies, operate within a construct in which its officers must decide which contracting methods, vehicles, and tools to employ in order to effectively carry out their missions. The “Defense Type Contracting Continuum” looks primarily to the different types of competition (full and open, limited, and sole-source) and attendant transparency requirements in relation to the speed in which the goods and services are needed. Although the model specifically addresses military contingency operations, the lessons are equally applicable when the “battlefield” is a domestic natural disaster.

This model posits that there is no one-way-fits-all approach to military contingency contracting and different approaches must be taken based on the circumstances encountered on the battlefield. Whereas CICA and the FAR establish a procurement system based on competition and transparency,⁹² the “balance” between speed in acquiring the necessary goods or services and competition and transparency can, and will, vary across the continuum of operations from peacetime operations to initiation of hostilities to stabilization and return to peaceful operations. The government may set aside competition and transparency as hostilities become imminent and are initiated. As the situation stabilizes, the government may then return to full and open competition and full transparency. “No one approach to contracting is appropriate all the time. . . . [T]he

⁹² See Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROC. L. REV. 103 (2002).

appropriate balance between speed and transparency may vary greatly depending on the urgency of the requirement or the opportunity for traditional oversight.”⁹³ The Continuum is illustrated as follows:

Defense Contracting Type Continuum⁹⁴



The peacetime requirements deal with the “status quo,” where “the desired outcome is maximum transparency using full and open competition to the maximum extent possible. . . . There is little need to waive any of the [CICA] requirements, as time and resources are plentiful.”⁹⁵ This contracting mechanism is the most transparent and the slowest. It assumes time is not of the essence and values the perception that all participants operate on a level playing field over the speed with which the procurement is made.

As the situation moves toward hostilities, limited competition contracting approaches “may be appropriate for pending wartime operations based on the need to react quickly to emerging requirements.”⁹⁶ Limited competition is

often more appropriate for pre-conflict or reconstruction operations, when there is not abundant time for planning. Limited competition allows a

⁹³ *Id.*

⁹⁴ Green, *supra* note 91, at 8.

⁹⁵ *Id.*

⁹⁶ *Id.*

degree of competition and is faster than full and open competition. Short notice or rapidly emerging requirements that do not rise to the level of urgent needs are often good candidates for the use of limited competition. Placed in the middle of the continuum, limited competition acts as a compromise between the speed of sole-source contracting and the transparency of full and open competition.⁹⁷

Green places task order and delivery order contracting within this phase. “Under these conditions, it is imperative that task orders be limited to services required immediately, and these orders should be replaced as soon as possible by competitively awarded contracts. Limited competition balances the competing interests of speed and transparency, and is a useful tool in meeting emerging requirements.”⁹⁸

Upon initiation of hostilities, “the normal parameters of the defense acquisition community shift to maximize the speed of contracting. Here, sacrifice of maximum transparency is appropriate when it is critical to field goods and services to U.S. forces rapidly.”⁹⁹ However, “the lack of competition makes them ripe for abuse and therefore subject to intense scrutiny.”¹⁰⁰ They are “highly controversial and only appropriate in situations authorized in law and, as in a post-conflict environment, immediately necessary to prevent additional casualties or fatalities.”¹⁰¹

Contracting operations return to full and open competition as the situation returns to normal peacetime operations. To Green, “the decisive factor in returning to a system of maximum transparency is the ability of DOD contracting operations to deliver goods and services on a schedule acceptable to the requiring authority.”¹⁰² Green proposes

⁹⁷ *Id.* at 9.

⁹⁸ *Id.* at 6.

⁹⁹ Green, *supra* note 91, at 6.

¹⁰⁰ *Id.* at 7.

¹⁰¹ *Id.*

¹⁰² *Id.*

“DOD could take important steps to institutionalize processes to transition from sole-source through limited competition to a return to full and open competition in as expeditious a manner as possible.”¹⁰³ This Defense Continuum provides a meaningful construct beyond military contingency contracting. Its lessons are equally applicable for domestic emergency situations.

B. *Emergency Procurement Tools and Vehicles*

1. FAR Part 18

After Hurricane Katrina, the Office of Federal Public Procurement found that many government “officials were unfamiliar with acquisition flexibility regulations regarding emergency situations.”¹⁰⁴ On July 12, 2006, FAR Part 18 was released with the goal of making “access to [the flexible] rules and policies easier and less time-consuming.”¹⁰⁵ FAR Part 18 identifies “specific techniques or procedures that may be used to streamline the standard acquisition process.”¹⁰⁶ They include “available acquisition flexibilities” that are generally available and “emergency acquisition flexibilities that are available only under prescribed circumstances.”¹⁰⁷ Available flexibilities include the federal supply schedules, multi-agency blanket purchasing

¹⁰³ *Id.*

¹⁰⁴ Matthew Weigelt, *Emergency Provisions Added to FAR*, FED. COMPUTER WKLY, <http://www.fcw.com/article95242-07-12-06-Web&newsletter%3Dyes>. This is unfortunate, given the May 2003 *Guidelines for Using Emergency Procurement Flexibilities*, a succinct description of procurement tools available for use during contingencies and emergencies, issued by OFPP to all executive agencies. See OFFICE OF FEDERAL PUBLIC PROCUREMENT, OFFICE OF MANAGEMENT AND BUDGET, GUIDELINES FOR USING EMERGENCY PROCUREMENT FLEXIBILITIES (May 31, 2003), *available at* http://whitehouse.gov/omb/procurement/emergency_procurement_flexibilities.pdf.

¹⁰⁵ Weigelt, *supra* note 104, at 1.

¹⁰⁶ FAR 18.000.

¹⁰⁷ *Id.*

agreements (BPAs), and multi-agency IDIQ contracts.¹⁰⁸ Other vehicles include single source purchases under the simplified acquisition threshold, letter contracts, SBA 8(a) program contracts, HUBZone sole source awards, and service-disabled veteran-owned small business sole source awards. Tools and techniques include waivers of Central Contractor Registration requirements, synopsis notice, qualification requirements, bid guarantees, and electronic funds transfer. The FAR also provides for sole source or limited competition involving urgent requirements, oral requests for proposals, and advance payments. In times of contingency, micro-purchase and simplified acquisition thresholds increase to \$15,000 (\$25,000 if outside the U.S.) and \$250,000, respectively.¹⁰⁹

2. Katrina-Specific Tools

On September 8, 2005, President Bush signed the Second Supplemental Emergency Appropriation for Hurricane Katrina Relief.¹¹⁰ Section 101 of the Appropriation raised the micro-purchases threshold from \$2,500 to \$250,000.¹¹¹

¹⁰⁸ See FAR 18.105.

¹⁰⁹ See FAR 13.201(g) (“Purchases using this authority must have a clear and direct relationship to the support of a contingency operation or the defense against or recovery from nuclear, biological, chemical, or radiological attack.”); FAR 2.101 (definition of “simplified acquisition threshold”).

¹¹⁰ Second Emergency Supplemental Appropriations Act to Meet Immediate Needs Arising From the Consequences of Hurricane Katrina, Public Law No. 109-62 (2005).

¹¹¹ Pub. L. No. 109-62, 119 Stat. 1990 (2005). This allowed such purchases to be made “without competitive quotations” if the contracting officer “determines the price for the purchase is reasonable.” 41 U.S.C § 428; *see also* FAR 13.202(a). Micro-purchases are “exempt from virtually all procurement laws.” KAREN L. MANOS, 1 GOVERNMENT CONTRACT COSTS & PRICING § 2:E:2 (2004); *see also* *Hurricane Katrina Relief Legislation: Impact on Procurement, Hearing before the U.S. Senate Democratic Policy Comm.* (Sept. 16, 2005), (statement of Professor Christopher R. Yukins) reprinted in GOVERNMENT CONTRACTING IN A “NEW” ERA: FLEXIBILITIES, CONSTRAINTS AND REALITIES, ABA PUBLIC CONTRACT LAW SECTION’S 12TH ANNUAL FEDERAL PROCUREMENT INSTITUTE

Immediate attention and criticism ensued.¹¹² Although the increased threshold remained on the books, its use did not last long. On October 3, 2005, the Office of Management and Budget “issued guidance to federal agencies that effectively return[ed] the purchase limit for government credit card purchases to pre-hurricane levels.”¹¹³

President Bush also suspended application of the Davis-Bacon Act to federal contracts entered into across the Gulf Coast¹¹⁴ and waived affirmative action plans for Katrina-related contracts.¹¹⁵ Although these are not contracting vehicles or thresholds, they expedite contractual actions and lower barriers to entry for contractors who otherwise would not have been able to receive federal contracts.¹¹⁶

Except for the increase in the micro-purchase threshold, these standing and ad hoc “flexibilities” are valuable tools in the contracting agencies’ toolbox. Many of the tools

(Mar. 2-3, 2006) at Annapolis, Maryland (Vol I, Tab R). The only restriction is that micro-purchases must “be distributed equitably among qualified suppliers.” 41 U.S.C. § 428; FAR 13.202(a).

¹¹² See, e.g., Yukins, *supra* note 111.

¹¹³ See Public Release 2005-26, Office of Management and Budget (Oct. 3, 2005), available at <http://www.whitehouse.gov/omb/pubpress/2005/2005-26.pdf> (The release continues “Initially raised to help expedite the delivery of needed relief supplies to hurricane victims, the higher purchase limits are no longer needed and will be used only in ‘exceptional circumstances’ to guard against fraud and abuse.”).

¹¹⁴ See Proclamation by the President: To Suspend Subchapter IV of Chapter 31 of Title 40, United States Code, Within a Limited Geographic Area in Response to the National Emergency Caused by Hurricane Katrina, <http://www.whitehouse.gov/news/releases/2005/09/20050908-5.html>.

¹¹⁵ See *New Katrina Federal Contractors Exempt from Affirmative Action for Three Months*, BNA EMP. DISCRIMINATION REP., Vol. 25, No. 11, Sept. 21, 2005, at 303, available at <http://subscript.bna.com/SAMPLES/edr.nsf/85256269004a991e8525611300214487/e1b5967c7fa7723f852570820075d847?OpenDocument>.

¹¹⁶ “The President’s proclamation means, in effect, that the wage guarantees of the Davis-Bacon Act will not apply to any federal contracts – whether related to reconstruction or not – across a broad swath of the South. Excepting federal procurement from wage rules such as the Davis-Bacon Act (or, for example, the Service Contract Act) reduces barriers to entry in the federal marketplace, but can have profound impacts on a labor market.” Yukins, *supra* note 111, at 3 n.2.

and techniques may be used within the IDIQ framework, especially those that reduce the barriers to entry allowing IDIQ contracts to be formed quickly and local and small businesses not within the federal contracting system.

C. Army's LOGCAP: Single to Multiple Awardees

Perhaps more significant than FEMA's dual-track strategy, the Army has taken a new tack with its colossal contingency contracting vehicle for logistical services, the Logistics Civil Augmentation Program (LOGCAP) contract. Because military contingency contracting is akin to domestic disaster and emergency contracting, this paradigmatic shift is especially noteworthy. The Army's abrupt shift reflects a more flexible understanding of multiple award IDIQ contracts. As with FEMA's strategy, it reflects an institutional awareness that competition during contingencies (and disasters) is not necessarily antithetical to or inconsistent with the agencies' missions. This section discusses the history, recent criticism and new direction of the LOGCAP.

1. History

Force reductions after the Vietnam War led the U.S. Army to "establish deliberately planned dependence on outsourcing Combat Support/Combat Service Support for wartime and other contingency use."¹¹⁷ In the early 1980s, Congress directed DoD to "establish a contingency contract capability that would support CONUS mobilization and overseas force support deployment needs."¹¹⁸ The Army was designated the executive agent. In 1985 Army Regulation 700-137 established the LOGCAP. The program drew criticism as a significant threat to force structure; others

¹¹⁷ Trautner, *supra* note 7, at 5.

¹¹⁸ *Id.* at 6.

distrusted contractors.¹¹⁹ The Army proceeded with the program, granting commands below the Department level (“numbered Armies”) the ability to develop, award and administer their own LOGCAP contracts. Army Central Command (ARCENT) let the first LOGCAP contract in 1989 to Perini, Inc.¹²⁰ The contract expired in July 1990. Shortly thereafter, Iraq invaded Kuwait and the Army put into place SAPDOP (Southwest Asia Petroleum Distribution and Operations Pipeline) at a much higher cost to support Operations Desert Shield/Storm. The Army recognized the decentralized approach would not work and decided upon a centralized LOGCAP with one umbrella contract supported by one prime contractor. Operations Desert Shield/Storm (ODS) provided a significant planning opportunity. After ODS, the Army planned to solicit the LOGCAP contract as it exists today. The USACE was designated to provide contract administration and execution support. In 1992, the first LOGCAP Umbrella Support Contract was competitively awarded to Brown & Root Services Corporation. Its first contingency support occurred in Somalia.¹²¹ From 1992-1996, LOGCAP supported operations in Rwanda, Haiti, Saudi Arabia, Kuwait and the Balkans.

In 1996, the Army Materiel Command took over LOGCAP contract administration, management and execution. In 1997, AMC re-competed the contract and awarded it to DynCorp Services, Inc. At that time, the support was “relegated to the conduct of extensive readiness exercises, assistance visits, deliver plans development and

¹¹⁹ *Id.* at 6-7 (“Contractors were thought to be too slow; too expensive; and, not controllable or useful as military personnel.”).

¹²⁰ *Id.*

¹²¹ *Id.* at 9-10. Their service puts them in harm’s way. Trautner notes that “several LOGCAP contractors [were] killed and wounded with the ‘Black Hawk Down’ incident.” *Id.* Scores of KBR contractors have been killed since the Iraq War began. See <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs>.

support of minor Events. Benign event support was conducted in East Timor, Panama, Columbia, and Haiti.”¹²² The “minor support” and Balkans support was approximately \$42 million.¹²³ After September 11, 2001, AMC recompeted the contract and Kellogg Brown & Root Services (KBR), a corporate successor to Brown & Root, won the contract. AMC made significant changes to the contract. The major changes included expanding the definition of “contingency” and lengthening the award period from five to ten years (one base year and nine option years). LOGCAP became the “contract of choice when fighting ‘American’s Global War on Terrorism.’”¹²⁴

2. Recent Criticism

Although noted for its “globally rapid, vast and flexible [contingency] support,”¹²⁵ the LOGCAP contract has come under intense scrutiny primarily for its use during the Iraq War and reconstruction. Critics allege that the exclusive deal “has allowed Halliburton [the corporate parent to KBR] to charge unreasonably high costs for some work.”¹²⁶ KBR has also been criticized for poor quality of its work.¹²⁷ Others cite the contract as an example of political cronyism.¹²⁸ Representative Henry Waxman stated, “The termination of Halliburton’s contract is long overdue. Taxpayers can breathe easier

¹²² *Id.* at 11.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 12.

¹²⁶ James Glanz, *Army Plans to End Contentious Halliburton Logistics Pact and Split Work Among Companies*, N.Y. TIMES, Jul. 13, 2006, available at <http://www.nytimes.com/2006/07/13/washington/13halliburton.html>.

¹²⁷ Holly Yeager, *Halliburton Loses Army Contract in Iraq*, FINANCIAL TIMES, July 12, 2006, available at <http://www.msnbc.com/id/13831996/print/1/displaymode/1098>.

¹²⁸ Glanz, *supra* note 126.

knowing that the days of \$45 cases of soda and \$100 bags of laundry are coming to a close.”¹²⁹

3. A New Direction

The U.S. Army recently announced that it was not exercising the option to renew the LOGCAP contract with KBR, a subsidiary of Halliburton. At the time of award, the contract “was relatively modest in size, but stubborn insurgencies in both Iraq and Afghanistan . . . stretched U.S. troops and kept Halliburton busy trying to meet their needs.”¹³⁰ In 2005, the Army paid KBR more than \$7 billion. It is estimated the Army will pay KBR between \$4 billion and \$5 billion in 2006.¹³¹ KBR has grossed more than \$15 billion since 2001.¹³²

The Army’s plan is to let the contract as a multiple award contract. The Army will award one contract for planning and oversight and three contractors “will compete for the actual job orders.”¹³³ An Army spokesperson said the Army “hoped this approach would foster competition and lower the risks of having one large contractor in charge of critical military programs.”¹³⁴ Additionally, “the change would improve planning and accountability, and provide better contingency options if one contractor performed poorly.”¹³⁵ The Army noted that “the widespread criticism of Halliburton’s work” had

¹²⁹ Will Dunham, *Army to rebid huge Halliburton Contract*, REUTERS, July 12, 2006.

¹³⁰ Griff Witte, *Army to End Expansive, Exclusive Halliburton Deal*, WASH. POST, Jul. 12, 2006, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/11/AR2006071101459.html>.

¹³¹ *Id.*

¹³² Glanz, *supra* note 126.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Yeager, *supra* note 127.

played no role “in generating the proposed changes,” rather “the shift was driven only by the surging logistics needs of the American military.”¹³⁶

LOGCAP, like FEMA’s initial post-Katrina contracts, gave rise to significant criticism of overpricing and poor performance, cronyism, and the like. Although LOGCAP was generally successful in providing the necessary goods and services, it failed to meet the same expectations other agencies failed to meet in their Hurricane Katrina response contracting. By abandoning the sole source arrangement, the Army is now in a position to maximize the flexibility of multiple award IDIQ contracts and meet the expectations the system has imposed upon its contingency contracting.

D. IDIQ Contracting Under FASA and the FAR

Observers readily acknowledge that the lack of (and insufficiency of) advance contracts, most notably IDIQ contracts, were significant deficiencies in federal procurement response to Hurricane Katrina.¹³⁷ Since Katrina, proponents of IDIQ contracts suggest a traditional, and rather myopic, use of IDIQ contracts.¹³⁸ These proponents recognize the “advance” aspect, the “speed” they afford, and even their two-tier “competition,” but overlook, disregard or ignore the greater flexibility IDIQ contracts offer.¹³⁹ They seem to relegate IDIQ contracts only to those situations where the needs

¹³⁶ Glanz, *supra* note 126.

¹³⁷ See, e.g., *supra* note 27. Agencies establish umbrella agreements so they are in place in the event of a disaster. When a disaster occurs, agencies may order needed goods or services in an expeditious manner off the umbrella agreements. Hurricane Katrina breathed new life into a contracting vehicle that suffered from intense criticism, albeit more for the lack thereof and questionable implementation than anything else. See *supra* Part II.B.

¹³⁸ See, e.g., Kunz, *supra* note 12, at 13; Kathleen E. Karelis & David B. Robbins, *Government Contracting After A National Disaster*, 05-11 BRIEFING PAPERS 1, 3 (Oct. 2005).

¹³⁹ See Kunz, *supra* note 12, at 13:

are anticipated in advance and the goods or services may be ordered when time precludes broader competition.¹⁴⁰

However, the flexibility of IDIQ contracting allows for broader use during contingencies in lieu of sole source contracts and can effectively meet the expectations of the FAR and voiced by Congress and the public. In order to understand the role and value of multiple award IDIQ contracts, how they can meet the expectations discussed in Section II, and flex with the circumstances, one must understand what an IDIQ contract, in its basic form, is and what it does.

1. A Brief History

Task order and delivery order contracting have long been a part of the U.S. federal procurement system. Up until the early 1990s, federal agencies made regular use of IDIQ contracts. Notwithstanding their use, questions of their legality were raised.¹⁴¹ More concern was raised, however, due to the lack of guidance and oversight. In the early 1990s, Congress and the Executive branches launched investigations, which “disclosed a loosely managed, rapid expansion of task and delivery order contracting.”¹⁴²

One of the clear lessons both FEMA and the government-contracting community as a whole learned is the need for agencies to have contract vehicles in place prior to a disaster so the government will have immediate access to contractor products and services for response and recovery work. When contract vehicles are not in place prior to a disaster, the government has to spend precious time and effort administering emergency procurement actions that often compromise fundamental government contracting principles, such as full and open competition and that suspend contracting safeguards, such as thresholds for disclosure of contractor cost or pricing data.

¹⁴⁰ See, e.g., Green, *supra* note 91, at 5.

¹⁴¹ See Peter Ritenberg, *Task-Order Contracts: Popular but are they legal?*, 22 NAT'L CONT. MGMT. J. 33 (Summer 1988).

¹⁴² Louis D. Victorino & John W. Chierichella, *Multiple Award Task & Delivery Order Contracts*, 96-10 BRIEFING PAPERS 1 (Sept. 1996) (noting that “congressional hearings

However, they recognized the value of this procurement method. The Department of Defense Advisory Panel on Streamlining and Codifying Acquisition Laws (also known as the Section 800 Panel) “concluded that many government requirements would be unnecessarily delayed if agencies were not given the clear authority to enter into delivery order contracts for products and task order contracts for services.”¹⁴³ The Panel recommended statutory authorization of task order and delivery order contracts.¹⁴⁴

The Federal Acquisition Streamlining Act¹⁴⁵ of 1994 statutorily recognized IDIQ contracts, provided a preference for multiple award contracts, and established parameters under which IDIQ contracts could be formed and administered.¹⁴⁶ Importantly, the streamlined acquisition process was intended for day-to-day contracting, as a tool for reform so as to increase commercial-like procurement practices efficiency and decrease the acquisition workforce, not necessarily as an emergency contracting tool. It did not require a contingency, disaster or emergency to trigger its use. Exceptions to IDIQ competition requirements could be taken if the “agency need is so urgent the providing a fair opportunity would result in unacceptable delays.”¹⁴⁷

Task order and delivery order contracting has been abused and poorly implemented which has led to significant criticism. It has been the subject of GAO

and executive branch investigations disclosed problems, in particular, in the use of task order contracts for technical and environmental engineering services. Contracts for these services had been awarded with vague, loosely drafted specifications or statements of work that were expanded dramatically after award in the scope and quantity of work.”).

¹⁴³ John A. Howell, *Governmentwide Agency Contracts: Vehicle Overcrowding on the Procurement Highway*, 27 PUB. CONT. L.J. 395, 400 (1998).

¹⁴⁴ *Id.*

¹⁴⁵ Pub. L. No. 103-355, 108 Stat. 3243 (1994).

¹⁴⁶ The Conference Report indicates that this is was the “codification of existing authority to use such contractual vehicles.” Conf. Rep. 103-712, 103d Cong., 2d Sess. (1994), 1994 U.S.C.C.A.N. 2607, 1994 WL 454842 (Leg. Hist.).

¹⁴⁷ FAR 16.505(b)(2).

investigations, Inspectors General reports, and immense scrutiny from scholars and practitioners.¹⁴⁸ Task order and delivery order contracting did not remain in its FASA-established condition for long, as it has been amended various times since then.¹⁴⁹ The next section presents the current requirements for IDIQ contracting.

2. The Regulatory Basics

Federal Acquisition Regulation Subpart 16.5 implements statutory provisions governing indefinite delivery contracts, including requirements and indefinite quantity contracts. Generally, IDIQ contracts “may be used to acquire supplies and/or services when the exact times and/or exact quantities of future deliveries are not known at the time of contract award.”¹⁵⁰ An IDIQ contract “provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period. The Government places orders for individual requirements” off the contract.¹⁵¹ “The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity”

¹⁴⁸ See, e.g., U.S. Government Accountability Office, CIVILIAN AGENCY COMPLIANCE WITH TASK AND DELIVERY ORDER CONTRACTS, Report No. GAO-03-983 (Aug. 2003). GAO, FEW COMPETING FOR LARGE DOD INFORMATION TECHNOLOGY ORDERS, Report No. GAO/NSIAD-00-56 (Mar. 2000). For Inspector General reports, see U.S. Department of Defense, Office of the Inspector General, DOD USE OF MULTIPLE AWARD TASK ORDER CONTRACTS, Report No. 99-16 (Apr. 2, 1999). DoD Office of the Inspector General, MULTIPLE AWARD CONTRACTS FOR SERVICES, Report No. D-2001-189 (Sept. 28, 2001). DoD, Office of the Inspector General, CONTRACT ACTIONS AWARDED TO SMALL BUSINESSES, Report No. D-2003-29 (Sept. 2001). For scholarly reviews, see Nash & Cibinic, *supra* note 6; Thomas F. Burke & Stanley C. Dees, Feature Comment, *The Impact of Multiple-Award Contracts On The Underlying Values of the Federal Procurement System*, 44 GOV'T CONT. ¶ 431 (Nov. 6, 2002).

¹⁴⁹ See Cheryl Lee Sander & Mary Ita Snyder, *Multiple Award Task and Delivery Order Contracting: A Contracting Primer*, 30 PUB. CONT. L.J. 461 (2001); Michael James Lohnes, *Attempting to Spur Competition for Orders Placed Under Multiple Award Task Order and MAS Contracts: The Journey to the Unworkable Section 803*, 33 PUB. CONT. L.J. 599 (2004).

¹⁵⁰ FAR 16.501-2 (a).

¹⁵¹ FAR 16.504(a).

and “the contractor must furnish any additional quantities [ordered by the Government], not to exceed the stated maximum.”¹⁵²

The solicitation and contract must specify the period of the contract (including options); total minimum and maximum quantity of supplies or services to be purchased; a “statement of work, specifications, or other description that reasonably describes the general scope, nature, complexity and purpose of the supplies or services . . . in a manner that will enable a prospective offeror to decide whether to submit an offer”; and the procedures the Government will use to issue orders. If multiple awards may be made, the solicitation must “state the procedures and selection criteria that the Government will use to provide awardees a fair opportunity to be considered for each order.”¹⁵³

IDIQ contracts are typically competed and awarded in the same fashion as any other negotiated federal procurement contract. They may be solicited using sealed bidding, competitive negotiation, (or even simplified acquisition methods when the anticipated maximum orders are within the appropriate thresholds), and may be awarded based on lowest price or “best value.”¹⁵⁴ They are presumptively awarded through full and open competition unless other than full and open competition is justified and documented.¹⁵⁵ They are also subject to set-asides for preferred “concerns” such as small businesses and minority –owned businesses.

FASA and the FAR express a preference for multiple awards of IDIQ contracts.¹⁵⁶ “The contracting officer must, to the maximum extent practicable, give preference to

¹⁵² *Id.* To ensure the contract is binding, the quantity must be more than a nominal amount.

¹⁵³ *Id.*

¹⁵⁴ *See* FAR 15.101.

¹⁵⁵ FAR 6.101.

¹⁵⁶ 16.504(c).

making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources.”¹⁵⁷ The decision whether multiple awards are appropriate must be made during acquisition planning. The FAR specifies factors the contracting officer should consider when determining the number of contracts to be awarded¹⁵⁸ and directs when the multiple award approach must *not* be used.¹⁵⁹ The U.S. Government Accountability Office (GAO) and Court of Federal Claims have sustained bid protests against single-award IDIQ contracts on the ground that an agency’s justification was “not sufficient to reasonably overcome the preference for multiple awards.”¹⁶⁰

Once an IDIQ contract is in place, agencies may place individual orders under the contract. Orders must “clearly describe all services to be performed or supplies to be delivered.”¹⁶¹ They must “be within the scope, issued within the period of performance, and be within the maximum value of the contract.” Contracting officers need not synopsise the orders nor give notice of order awards.¹⁶² Orders may be placed under IDIQ contracts awarded by another agency provided the Economy Act and other regulations and policies are complied with.¹⁶³ FASA expressly exempts “the issuance or

¹⁵⁷ *Id.* Note that there is no limit to the number of participants. Although award of the contract requires compliance with CICA, award of orders does not. And it is at the order level that the money is made.

¹⁵⁸ *Id.* Factors include the scope and complexity of contract requirements, the expected duration and frequency of orders, the mix of resources a contractor must have to perform expected requirements, and the ability to maintain competition throughout the contract period. *Id.* at (1)(A).

¹⁵⁹ *Id.*

¹⁶⁰ See *One Source Mechanical*, B-293692, Jun. 1, 2004, 2004 C.P.D. ¶ 112 (Comp. Gen.), at 3; *WinSTAR Comm., Inc. v. United States*, 41 Fed. Cl. 748, 762 (1998).

¹⁶¹ FAR 16.505(a)(2).

¹⁶² See FAR 16.505(a)(1); FAR 5.301(b)(4).

¹⁶³ Economy Act, 31 U.S.C. § 1535; FAR 17.502.

proposed issuance of an order under a task-order contract or delivery-order contract” from protest “except for a protest on the grounds that the order increases the scope, period, or maximum value of the contract.”¹⁶⁴

Under multiple award IDIQ contracts, the FASA and FAR require that the contracting officer “provide each awardee a fair *opportunity* to be considered for each order exceeding \$2,500” unless certain exceptions apply.¹⁶⁵ FASA and the FAR grant the contracting officer

broad discretion in developing appropriate order placement procedures. The contracting officer should keep submission requirements to a minimum. Contracting officers may use streamlined procedures, including oral presentations. In addition, the contracting officer *need not contact each of the multiple awardees* under the contract before selecting an order awardee if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order.¹⁶⁶

The FAR also identifies specific exceptions to the fair opportunity requirement. They are: (1) the agency need is so urgent the providing a fair opportunity would result in unacceptable delays; (2) only one awardee is capable of providing the supplies or services at the level of quality required; (3) it is a logical follow-on to an order already issued for the original order; or (4) it is necessary to satisfy a minimum guarantee.¹⁶⁷ On its face, the “fair opportunity” requirement appears to require a minimum level of

¹⁶⁴ 10 U.S.C. § 2304c(d), 41 U.S.C. § 253j(d), FAR 16.505(a)(9). Note that since FASA does not apply to Multiple Award Schedule contracts such as the GSA Schedules, this jurisdictional limitation does not apply. *See* *Severn Cos., Inc.*, B-275717, Apr. 28, 1997, 97-1 CPD ¶ 181, at 2 n.1 (GAO exercised jurisdiction over Federal Supply Service (FSS) orders since FASA restriction does not apply).

¹⁶⁵ FAR 16.505(b). This standard is markedly different from the competition requirements for contract awards (including the IDIQ contracts themselves) under FAR Part 6 and FAR Subpart 15.3, from which orders under ID/IQ contracts are expressly exempted. *See* FAR 16.505(b)(1)(ii).

¹⁶⁶ FAR 16.505(b) (emphasis added).

¹⁶⁷ *See* FAR 16.505(b)(2).

competition. A significant weakness is that this requirement has not deterred noncompetitive practices¹⁶⁸ and contractors are not able to protest award of an order based on failure to provide a “fair opportunity” to all IDIQ contractors.¹⁶⁹ Notwithstanding this weakness, proper formation and administration of multiple award IDIQ contracts may obviate such actions by providing broad benefits that may significantly outweigh the narrow perceived benefits of noncompetitive practices.¹⁷⁰

The Department of Defense (DoD) played a significant role in Hurricane Katrina relief efforts, more so than for any previous natural disaster.¹⁷¹ Given DoD’s significant role, and that several government reports support DoD’s greater participation,¹⁷² it is important to understand the additional requirements DoD must follow regarding IDIQ contracts. USACE is a major participant in disaster relief and, because it is part of the

¹⁶⁸ They have led to, *inter alia*, improper sole source awards, improperly supported waivers of competition requirements, and even awarding multiple awards with no intention of utilizing more than one contractor. *See, e.g.*, Yukins, *supra* note 4, at 65-72. These abuses are only compounded by the fact that the FASA and the FAR expressly dictate that orders are not to be treated as contracts for purposes of bid protests except for certain limited bases and prohibit a contractor from challenging most awards of IDIQ orders to another contractor.

¹⁶⁹ *See supra* note 164 and accompanying text.

¹⁷⁰ *See infra* Part IV.C.

¹⁷¹ *See* WHITE HOUSE, *supra* note 14, at 43; SELECT BIPARTISAN COMMITTEE, *supra* note 26, at 327.

¹⁷² *See, e.g.*, WHITE HOUSE, *supra* note 14, at 43; U.S. GAO, Report No. GAO-06-365R, *supra* note 27, at 5; SELECT BIPARTISAN COMMITTEE, *supra* note 26, at 327:

Select Committee Members stated and Brown agreed FEMA should develop a formal planning and logistics process similar to that developed by the Department of Defense (DOD). Some officials have suggested the DOD simply assume a larger role in logistics, or even take control outright. Although recognizing the value of DOD assistance, [FEMA Director Michael] Brown indicated DOD involvement would not be appropriate for smaller events. “I think that the Army can help FEMA in that regard,” Brown said. “I would rather see it remain within FEMA because logistics is something that you need in every disaster, the smallest one that FEMA might be involved in to the largest; and I don’t want to see us utilize the military in all of those.

DoD, is subject to these requirements. Section 803 of the 2002 National Defense Authorization Act¹⁷³ prescribes more rigorous competition requirements under multiple-award contracts and the GSA Multiple Award Schedules (MAS) contracts for DoD orders for services for more than \$100,000.¹⁷⁴ For contract orders under master contracts with multiple awardees, DoD contracting activities must solicit quotations from all eligible contractors offering the required services. For orders under the GSA MAS, DoD contracting activities must solicit all contractors offering the required services or as many as practicable to ensure the receipt of three offers. Under both approaches, contracting activities “must provide a fair notice of the intent to make the purchase, a description of the work the contractor shall perform, and the basis upon which the contracting officer will make the selection.”¹⁷⁵ Additionally, under both types of contracts, DoD contracting agencies are “required to afford all responding contractors a fair opportunity to make an offer and have that offer fairly considered.”¹⁷⁶ The FAR 16.505(b)(2) exceptions to the fair opportunity process still apply, and, therefore orders may be made with limited competition if one or more exceptions apply.¹⁷⁷

¹⁷³ Pub. L. No. 107-107, 115 Stat. 1012 (Dec. 28, 2001).

¹⁷⁴ See U.S. Government Accountability Office, GUIDANCE NEEDED TO PROMOTE COMPETITION FOR DEFENSE TASK ORDERS, Report No. GAO 04-874 (July 2004).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 5.

¹⁷⁷ See DFARS 216.505-70. In July 2004, the GAO conducted an investigation into DOD implementation of Section 803. See U.S. GAO, Report No. GAO-04-874, *supra* note 174. Notwithstanding the stricter competition requirements, the GAO found that “[c]ompetition requirements were waived for nearly half of 74 multiple-award contract and federal supply schedule orders GAO reviewed.” Additionally, “safeguards to ensure that waivers were granted only under appropriate circumstances were lacking,” and competition for most of the remaining orders was limited. On March 21, 2006, guidance was added to DFARS 216.505-70 regarding use of the exceptions to the “fair opportunity to compete” requirement. See DFARS PGI 216.505-70.

3. Central Purchasing Bodies: GSA Schedules and Multi-Agency IDIQ Contracts

An important part of disaster contracting is those IDIQ contracts already in place with other agencies from which the contracting agency may order, such as the Government Services Administration (GSA) Multiple Award Schedules (MAS).¹⁷⁸ Additionally, under the Economy Act, agencies may order from other agencies' contracts.¹⁷⁹ These IDIQ contracts provide a mechanism for other agencies to expeditiously order goods and services with less administrative burden on their own personnel.

GSA became a centralized Federal procurement and property management agency when it took over management of the "General Schedule of Supplies" from the Department of the Treasury. This evolved into the GSA Schedules Program.¹⁸⁰ The GSA Schedules are governed by FAR Subpart 8.4. GSA administers 43 schedules with 11.2 million different services and products through 17,495 contracts.¹⁸¹ Contracts are typically awarded for 5-year base periods and three 5-year options. GSA has a continuous open solicitation policy under which offers for commercial goods and services may be submitted at any time. Additionally, contractors may request to add goods or services to their contracts at any time during the term of the contract.¹⁸²

¹⁷⁸ The GSA MAS Program derives its authority from Title III of the Federal Property and Administrative Services Act of 1949 and Title 40 United States Code, Public Building, Property and Works. 41 U.S.C. § 251 *et seq.*

¹⁷⁹ See Economy Act, 31 U.S.C. § 1535; FAR 17.502.

¹⁸⁰ ACQUISITION ADVISORY PANEL, OFFICE OF THE PRESIDENT, PRELIMINARY WORKING GROUP DRAFT, INTERAGENCY CONTRACT VEHICLES (Feb. 16, 2006) (Discussion Draft) 11.

¹⁸¹ *Id.* at 12.

¹⁸² *Id.* at 13.

GSA's core objective is "to use commercial terms and conditions and the leverage of the Government's volume buying to achieve the best possible prices and terms for both customers and taxpayers."¹⁸³ The program provides agencies with a simplified, streamlined ordering process." A GSA study indicated "it takes users an average of 15 days to issue an order under a Schedule contract compared to an average of 268 days to put a standalone contract in place."¹⁸⁴

IV. SCALABLE MULTIPLE AWARD IDIQ CONTRACTS

Because they are "scalable," multiple award IDIQ contracts can stretch across the spectrum from pre-disaster preparations to post-disaster recovery and reconstruction, and can run the gamut of the goods and services necessary at each phase along the spectrum. IDIQ contracts' greatest flexibility comes in the immediate crisis period itself. IDIQ contracts offer a practical solution to disaster contracting urgency and uncertainty as they provide for the evolution of objectives, scale back competition and transparency only when absolutely necessary, and always maintain the quick response and flexibility necessary for lower administrative burdens and fast crisis/disaster responses. IDIQ contracts also lower the pressure on agencies to use no-bid contracts and other risky and anti-competitive alternatives, such as letter contracts, oral solicitations, and limited source selections. This section addresses each of the advantages in turn, in relation to a natural disaster, using Hurricane Katrina as the model.

¹⁸³ *Id.* (quoting Federal Supply Schedule Procurement Information Bulletin 04-02).

¹⁸⁴ *Id.* at 14.

A. *Phases*

1. Preparation/Standby

Hurricane season occurs each year during the summer and fall. Government agencies, such as the National Weather Service, track hurricanes, record data, and predict the number and magnitude of future hurricanes. In May 2005, the National Oceanic and Atmospheric Administration (NOAA) issued its 2005 Atlantic Hurricane Outlook.¹⁸⁵ NOAA predicted a 70% chance of an above-normal hurricane season of 12-15 tropical storms, with 7-9 becoming hurricanes and 3-5 of them becoming major hurricanes.¹⁸⁶ The majority of the storms would occur between August and October over the tropical Atlantic and the Caribbean Sea. NOAA was unable “to confidently predict at these extended ranges the number or intensity of landfalling hurricanes, and whether or not a given locality [would] be impacted by a hurricane [during the] season.”¹⁸⁷

Given the recurring nature of hurricanes, general planning and preparation are constantly underway. Federal disaster response agencies are able to take lessons learned, studies, experiences, pre-season and mid-season predictions, and the like, from past hurricanes and plan for the known as well as anticipate the unknown. On the contracting front, this early step is a time of acquisition planning and “advance contract” formation. Because the exact amounts of the goods or services and the times for delivery or performance are unknown, IDIQ contracts are the quintessential tool around which the planning and preparation should revolve. They provide agencies with a pool of pre-

¹⁸⁵ Press Release, National Oceanic and Atmospheric Administration, NOAA: 2005 Atlantic Hurricane Outlook (May 16, 2005), *available at* <http://www.cpc.noaa.gov/products/outlooks/hurricane2005/May/hurricane.html>.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

qualified contractors at the ready with anticipated goods and services. The goods and services, the projected range in quantities, and the number of contractors party to the multiple award contracts are within the discretion of the agency, derived and updated through its advance acquisition planning.

IDIQ contracts themselves are generally subject to maximum competition and transparency. As noted previously, the “umbrella” contracts are typically competed and awarded in the same fashion as any other negotiated federal procurement contract, through sealed bidding, competitive negotiation, or even simplified acquisition methods.¹⁸⁸ The pre-disaster ordering is also the time to maximize the FAR’s “fair opportunity to compete” requirement for task orders or delivery orders under IDIQ contracts.¹⁸⁹ In other words, contracting activities can ensure that most, if not all, eligible contractors are considered for the orders and may conduct mini-competitions within the already-competed umbrella contracts.

The FAR requires public notice of the IDIQ contract solicitation and award(s).¹⁹⁰ Under the FAR, once an IDIQ contract (multiple or single award) is awarded, this “full” transparency shrinks to minimal (if any) transparency for individual orders under the contracts. The only notice required is that given to those contractors contacted as part of the order issuing process (and even then, contact with contractors is not required).¹⁹¹ Section 803 of the 2002 Defense Authorization Act requires that DoD agencies solicit

¹⁸⁸ See *infra* Part III.D.2. Procurements are subject to full and open competition unless an exception applies.

¹⁸⁹ FAR 16.505(b) (“The contracting officer must provide each awardee a fair opportunity to be considered for each order exceeding \$2,500.”).

¹⁹⁰ See FAR Subparts 5.2, 5.3.

¹⁹¹ See FAR 16.505(b).

offers from more (and in some cases all) contractors offering the required services, which provides slightly more transparency to the ordering process.¹⁹²

The FAR allows for even less transparency as the situation becomes more urgent. Under FAR 5.202, contracting activities need not submit notices where there is an unusual and compelling urgency and the government would be seriously injured if the government were to comply with the time periods. Under FAR 5.302, notice of order award is not required at any time.

2. Imminent Disaster

The next phase begins at the point a looming crisis/disaster is specifically identified and ends when it occurs. This phase probably began for Hurricane Katrina when NOAA issued an updated outlook in August 2005.¹⁹³ This outlook called for “an extremely active season, with an expected seasonal total of 18-21 tropical storms (mean is 10), with 9-11 becoming hurricanes (mean is 6), and 5-7 of these becoming major hurricanes (mean is 2-3).”¹⁹⁴ NOAA warned that the rest of the season would be “very active” and “it was imperative that residents and government officials in hurricane-vulnerable communities have a hurricane preparedness plan in place.”¹⁹⁵ This notice arguably marked the initial transition into the “imminent disaster” phase. At the least, it should have heightened the awareness of public (local, state and federal) officials.

On August 21, 2005, the National Hurricane Center identified a system developing that eventually became Katrina. Thirty-six hours (on August 23) later it

¹⁹² See *supra* notes 173-177 and accompanying text.

¹⁹³ Press Release, National Oceanic and Atmospheric Administration, NOAA: August 2005 Update to Atlantic Hurricane Season Outlook (August 2, 2005), *available at* <http://www.cpc.noaa.gov/products/outlooks/hurricane2005/August/hurricane.html>.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* The Gulf Coast is clearly a “vulnerable community.”

became a tropical depression.¹⁹⁶ Hurricane watchers tracked and monitored Katrina's movement and size. "[W]ithin two and a half days of landfall of the center in Louisiana[, track forecasts] were exceptionally accurate and consistent."¹⁹⁷ Additionally, "within about three days of landfall in Louisiana, [every official forecast] correctly anticipated that Katrina would be a major hurricane (at least a Category 3) at landfall on the northern Gulf coast."¹⁹⁸ As hurricane watchers monitored Katrina's growth and direction, the timeline moved squarely into the "imminent disaster" phase. The length of this stage may be longer or shorter based on the nature of the crisis and the quality and accuracy of the forecast. With an approaching hurricane like Katrina, authorities usually have a few days' notice of location of landfall and magnitude of storm.¹⁹⁹

As the crisis or disaster approaches, the IDIQ contract can flex with the heightened levels of urgency. Goals and objectives evolve as immediate needs and concerns arise, including those unknown or not planned-for. Agencies issue orders from umbrella contracts and stage supplies near the anticipated disaster area.²⁰⁰ Under the FAR, competition (and transparency) can be limited so as not to delay the acquisition of urgently needed goods or services. However, such restrictions are not necessary under IDIQ contracts. Orders in this phase generally can and should remain competitive. Here it may be more appropriate to take advantage of the relatively loose competition required under the "fair opportunity" standard, or even to issue sole source orders, rather than

¹⁹⁶ See KNABB ET AL., *supra* note 15, at 13.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 14.

¹⁹⁹ A tsunami may only provide a few hours notice and an earthquake may provide no notice at all, thereby bypassing this phase altogether.

²⁰⁰ Even before landfall, Mississippi and Louisiana governors asked that the President declare a disaster area in the states to invoke federal aid under the Stafford Act. See SELECT BIPARTISAN COMMITTEE, *supra* note 26, at 36.

operate outside the normal ordering procedures for IDIQ contracts.²⁰¹ IDIQ contracts may be augmented through adding additional goods and services that may be necessary, adding contractors to existing contracts, or by competitively awarding new IDIQ contracts and issuing orders under them.

3. Disaster

The “Disaster” phase begins when the disaster or crisis begins, and ends when the agency’s efforts are no longer focused on relief to preserve the lives, health, safety and property of victims. This period of time may be brief or long, depending on the nature and circumstances of the disaster. Hurricane Katrina made landfall on August 29 and wreaked destruction across southern Louisiana and Mississippi, until the storm dissipated over southern Tennessee the next day. For nearly two weeks, federal, state and local authorities rescued stranded individuals, provided emergency medical care, removed corpses, removed debris, and performed other disaster relief tasks.

As in the prior phase, sole source and limited competition awards may be made. But, as with that phase, there is value to issuing orders under an IDIQ contract rather than entering into a new contract. A presumptive price has already been established, negotiated at the time the IDIQ contract was formed and when bargaining positions were more equal. Competition for IDIQ orders can be accomplished in short order, thus lowering the perceived need to sole-source a new contract.

²⁰¹ Although in extreme circumstances, the agency may invoke the “urgency” exception. Again, the obvious benefit to using an exception for a sole-source or limited competition order within the IDIQ contracts themselves rather than a sole source contract is that a price has been negotiated and may still be negotiated further. FAR 16.505(b)(2)(i) (citing as a statutory exception to the fair opportunity process where “[t]he agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays.”); FAR 8.405-6(b)(4) (justifying limited consideration of Federal Supply Schedules contractors for orders when “an urgent and compelling need exists”).

Because some important advance services contracts were not in place, FEMA was compelled to resort to limited competition to award the “big-four” IDIQ contracts.²⁰² They were “quickly awarded as Katrina approached and hit the Gulf Coast.”²⁰³ However, those contracts exceeded any reasonable amount and duration and were awarded to large, out-of-state companies, thus evoking extensive criticism.²⁰⁴ Some argue that given the immediacy and seriousness of the objectives (e.g., saving human lives), the ability of contractors to surge to respond quickly to a large-scale disaster is essential and requires large companies. This opinion is not universally held.²⁰⁵

Under planned, in-place IDIQ contracts, contracts holders know the requirements and are poised to respond in quick fashion. Where the needs are unknown until the disaster occurs, agencies may add contractors to the IDIQ contract, add supplies or

²⁰² See *supra* notes 9-11.

²⁰³ Spencer S. Hsu, *\$400 Million FEMA Contracts Now Total \$3.4 Billion*, WASH. POST (Aug. 9, 2006), at A08.

²⁰⁴ Recently, criticism has shifted to the fact that these IDIQ contracts were still being used despite FEMA’s newly awarded “replacement” contracts and they “ballooned in value from \$400 million to about \$3.4 billion.” *Id.* Additionally, they suffer from “poor safeguards and high costs.” *Id.* (citing DHS-IG, congressional auditors, and a Senate investigation).

²⁰⁵ Senator Olympia Snowe, Chair of the Senate Committee on Small Business and Entrepreneurship, challenges the notion that surge and quick response capability would preclude local or small business participation. She states, “While [FEMA’s] approach may be administratively convenient, I am concerned that it ignores the very real potential for delays which commonly occur when large companies attempt to mobilize and relocate workers and assets to the affected area. . . . Small businesses have proven to be capable partners in federal contracting.” Developments, *supra* note 11, at ¶ 440. From the other side, then-FEMA Director Michael Brown suggested the scale of the disaster and the complexity of the response require a large firm’s expertise and recommended “caution . . . [in] going down a path that says we’re going to have all locals do it.” He said, “Debris is a huge issue. Debris is one of those issues that is fraught with local politics. It’s fraught with fraud, waste and abuse [and] in cleaning up debris in a situation like Katrina, you really have to have experts overseeing that global perspective because you have hazardous waste. SELECT BIPARTISAN COMMITTEE, *supra* note 26, at 334. Regardless, IDIQ contracts properly administered, can put small and small-disadvantaged businesses into the disaster-recovery arena.

services not part of the contract, or create new IDIQ contracts and order under those contracts.

4. Recovery/Reconstruction

As the crisis dissipates and the immediate needs for preservation of life, health and safety have passed, the IDIQ contract can re-flex to its pre-disaster state. Pre-disaster speculation of needs and costs give way to tangible certainties. Among other things, roads and infrastructure must be repaired, debris removed, hospitals and public buildings rebuilt, and temporary alternative buildings and shelters provided. The needs evolve from saving lives and property to rebuilding and reconstructing the affected area. This is the most “political” of periods, especially in the wake of significant destruction like that wreaked by Hurricane Katrina, for tens if not hundreds of billions of dollars of contracts in government contracts are at stake. Who receives these contracts or orders is more important than in any other phase. Acquisition planning in the preceding phases provides the starting point, especially if such planning has accounted for the “political” imperatives, such as those reflected in the Stafford Act and the small business and small disadvantaged-business preferences. With IDIQ vehicles in place, agencies can move immediately into letting orders under the umbrella contracts. The agencies are able to award the orders quickly, with reasonable prices, and meet socioeconomic and political objectives, by issuing orders to local businesses or small or small-disadvantaged concerns who are party to the IDIQ. This may entail adding such contractors to existing IDIQ contracts. The last and more time consuming method would be to award new IDIQ contracts and then to award orders from them.

B. *Keys to Maximizing the Extraordinary Flexibilities and Meeting Expectations*

When contracts are awarded at the height of a disaster (and immediately preceding and following the disaster), they are generally awarded with little or no competition.²⁰⁶ Although procurement regulations generally allow for exceptions to full and open competition, the resulting contracts often have terms and conditions that are unclear, ambiguous, and/or indefinite. The circumstances are also ripe for “chaos and the potential for waste and fraud as acquisitions [are] made in haste.”²⁰⁷ This section identifies five keys to effective IDIQ contracting in order to maximize their extraordinary flexibilities: acquisition planning, the use of commercial commodities and commoditized services, “open” contracts, simplified contracts, and the use of central purchasing bodies as gap fillers.

1. Acquisition Planning

Acquisition planning is an essential part of “advance planning.” It serves the primary statutory requirement of “promoting and providing for the acquisition of commercial items and full and open competition, or, when full and open competition is not required . . . , to obtain competition to the maximum extent practicable, with due regard to the nature of the supplies or services to be acquired,”²⁰⁸ with the goal of best value (lower prices and/or “better” product) to the government. Federal law also

²⁰⁶ See *supra* Part III.A.

²⁰⁷ SELECT BIPARTISAN COMMITTEE, *supra* note 26, at 329. Some Committee members were troubled that nearly three months after Hurricane Katrina, “the government and contractor representatives who testified were unable to answer many basic questions about the scope, price, and terms of contracts awarded in response to Hurricane Katrina.” Additional Views of Representative Charlie Melancon and Representative William J. Jefferson, *id.* at Appendix 9 p. 8.

²⁰⁸ See FAR 7.102(a)

expressly requires “consideration of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns . . . , and the impact of any bundling that might affect their participation in the acquisition.”²⁰⁹

The importance of meaningful acquisition planning has not gone overlooked, particularly by the GAO.²¹⁰ While the GAO has been mindful of the circumstances under which agencies’ contracting officers must operate, and the needs they endeavor to fulfill, the GAO requires adherence to the statutes and regulations, including the requirement to conduct acquisition planning.²¹¹ The GAO recently affirmed its insistence on acquisition planning, even in the face of agency’s purported urgency in times of contingency operations.²¹² An exception to full and open competition will not pass GAO scrutiny if it is the result of poor acquisition planning.²¹³ Waiting too late in the process to prepare and plan may lead to a sustainable protest, even during a contingency.

²⁰⁹ See FAR 7.105(b).

²¹⁰ See, e.g., U.S. Government Accountability Office, HURRICANE KATRINA: PLANNING FOR AND MANAGEMENT OF FEDERAL DISASTER RECOVERY, Report No. GAO-06-622T (Apr. 10, 2006), at 7; U.S. Government Accountability Office, HURRICANES KATRINA AND RITA: PRELIMINARY OBSERVATIONS ON CONTACTING FOR RESPONSE AND RECOVERY EFFORTS, Report No. GAO-06-246T (Nov. 8, 2005), at 4.

²¹¹ See, e.g., WorldWide Language Resources, B-296985, Nov. 14, 2005, 2005 CPD ¶ 206.

²¹² *Id.* Although the GAO holds the government to the requirement to conduct acquisition planning, the standard is not high. “With regard to the requirement for advance planning, our Office has recognized that such planning need not be entirely error-free or successful. As with all actions taken by an agency, however, the advance planning required under 10 U.S.C. § 2304, must be reasonable.” WorldWide Language Resources, B-296985, Nov. 14, 2005, 2005 CPD ¶ 206 at *26. Notwithstanding GAO’s relatively low standard of review, it behooves the agency to prepare and implement a comprehensive and effective procurement strategy.

²¹³ See FAR 6.301(c).

Acquisition planning is a key element with regard to IDIQ contracting because it is a continuing activity, permeating all stages of the acquisition process--the umbrella contract and each task order or delivery order under the umbrella contract.²¹⁴ It also involves the entire contracting strategy, which may encompass multiple IDIQ contracts.²¹⁵

Acquisition planning is the primary tool by which the benefits of IDIQ contracting in a contingency or disaster are set in place so that when disasters occur, contracting agencies may operate within the bounds of the procurement system and avoid or overcome temptations to ignore the regulations. The additional keys discussed in this paper benefit greatly from comprehensive, effective and continuous acquisition planning.²¹⁶

2. Commercial items: Commodities and Commoditized Services

With regard to disaster recovery and response, the goods needed are predominantly commercial commodities, such as ice, water, and food. The services are primarily commercial items as well: temporary housing for victims and emergency workers and debris removal, among other things. There are arguably few, if any, goods

²¹⁴ FAR Part 7 addresses acquisition planning in general. FAR Part 16 identifies important considerations contracting officers must take into account during acquisition planning. The failure to consider these items may result in GAO sustaining a protest based on the agency's failure to consider them. *One Source Mechanical, B-293692*, June 1, 2004, 2004 C.P.D. ¶ 112 (Comp. Gen.), at 3 (sustaining a bid protest against a single-award IDIQ contract because an agency's justification was "not sufficient to reasonably overcome the preference for multiple awards").

²¹⁵ See, e.g., *Developments*, *supra* note 11, at ¶ 440.

²¹⁶ FEMA recently awarded 36 IDIQ contracts for Katrina-related reconstruction (March 2006) and six IDIQ contracts worth \$250 million apiece as part of its dual-track strategy (August 2006). See Griff Witte & Spencer S. Hsu, *Big Katrina Contractors Win More FEMA Work*, WASH. POST (Aug. 10, 2006), at D01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/09/AR2006080901931.html>.

or services used for disaster response that would not qualify as commercial items. Contracting agencies must identify commercial specifications and commercially available items as part of their disaster planning. FEMA failed to do so with its purchase of 10,000 mobile and manufactured homes. FEMA sought custom specifications, which delayed the arrival of the homes. Homes for commercial sale were available for immediate delivery.²¹⁷ Unfortunately, the homes as purchased were unsuitable for use in a flood plain area and could not be used for Katrina victim relief as intended. They are now stored at a municipal airport in Arkansas, costing the government \$47 million to store and maintain them.²¹⁸

Commercial item purchasing simplifies the acquisition procedures and the requirements.²¹⁹ Prices are competed in the commercial marketplace and it is easier and faster to compete contracts and orders when the items are primarily available in the commercial arena. Commercial item procurement also eases the administrative burden on acquisition personnel, by simplifying and streamlining acquisition procedures, mandating a preference for performance-based specifications in acquisitions for services,²²⁰ and placing quality assurance responsibilities primarily on the contractor.²²¹

²¹⁷ Developments, *Senate Holds Field Hearing in Arkansas On \$431 Million In Unused FEMA Housing*, 48 GOV'T CONTRACTOR ¶151 (Apr. 26, 2006).

²¹⁸ *Id.*

²¹⁹ See Steven Kelman, *Buying Commercial: An Introduction and Framework*, 27 PUB. CONT. L.J. 249 (1998); Jonathan D. Clark, *Overcoming the Critical Challenges of Contingency Contracting: Understanding the Flexibility Permitted by CICA, Simplified Acquisition Procedures, and Small Purchases*, 28 PUB. CONT. L.J. 503 (1999).

²²⁰ FAR 37.000 ("This part requires the use of performance-based acquisitions for services to the maximum extent practicable and prescribes policies and procedures for use of performance-based acquisition methods.").

²²¹ FAR 12.208 ("Contracts for commercial items shall rely on contractors' existing quality assurance systems as a substitute for Government inspection and testing before tender for acceptance unless customary market practices for the commercial item being

The linchpin with regard to IDIQ contracts for services is “commoditizing” the services. For instance, performance-based specifications for debris removal typically provide for payment based on the amount of debris removed not the time expended in performance. Contractors perform the work without government dictating the details. The agency pays a fixed price, which gives contractors incentive to control costs. Finally, purchase of commercial services will likely be more effective in ensuring a quality product and reasonable price if they “tie payment to tangible results--e.g., a completed and delivered product.”²²² The agency ensures completion by withholding payment until the commoditized service is completed.

3. “Open” IDIQ Contracts

The ability to add goods or services, and even contractors, is essential to the scalability of IDIQ contracts. As the GSA Schedules successfully demonstrate, IDIQ contracts do not need to be closed to additional contractors. Although contracting officers consider a host of factors when deciding upon the number of awardees, there is nothing in law that requires the contracting officer to identify a specific number of awardees or to close the umbrella contract at a fixed point in time. This allows open entrance at future times, which should provide flexibility for even greater participation at times and places where needs and location are more definite--when the disaster is imminent and its location is pinpointed, and when the event occurs.²²³ Further, it allows agencies to limit the use of noncompetitive means to procure goods or services “on the

acquired include in-process inspection. Any in-process inspection by the Government shall be conducted in a manner consistent with commercial practice.”).

²²² See OFPP, *supra* note 104, at 13.

²²³ This assumes, of course, that there are no other obstacles to a “latecomer” award, such as expiration of the latecomer’s offer.

fly,” in a hasty manner when the agencies’ negotiating position is weakest. It also serves as a tool to implement procurement objectives, such as incorporating set asides for local businesses, small business concerns or small disadvantaged business concerns. Finally, multiple awards will relieve administrative burdens associated with management of individual contracts.²²⁴

4. Simplified IDIQ Contracts

Among the most flexible aspects of IDIQ contracts is that they can be remarkably simple in principle and form.²²⁵ The simpler the contract, the more flexibility it has to add goods, services, or additional contractors. For relatively simple, labor-intensive, low technical work or commercial off the shelf goods, contracting officers may establish IDIQ contracts using the simplest multiple award contract format based on contractor’s price lists and catalogs establishing the umbrella agreement. Contracting officers may then order the services or goods in an expeditious manner. IDIQ contracts allow for competition that can be effected quickly and efficiently based on the price lists or catalogs. Simplifying IDIQ contracts serves to reduce further the barriers to entry for smaller business and those unfamiliar with the federal procurement system. Additionally, simple IDIQ contracts can be put into place quickly, if necessary, to provide for immediate needs not otherwise planned for. Orders can then be quickly issued from these IDIQ contracts.

²²⁴ While there are greater administrative costs for multiple award contracts, there are less political costs.

²²⁵ This is not always the case in practice, as is the case with the GSA Multiple Award Schedules. They are expensive and time consuming for contractors to join the Schedules. They require lengthy solicitation and contract documentation. However, practice under them is rather simple and quick. *See supra* Part III.D.3.

5. The Gap Filler: Central Purchasing Agencies

Central purchasing bodies and interagency contract vehicles are an important part of federal procurement strategy. They are especially important because the federal government has experienced a serious downsizing of its acquisition personnel.²²⁶ Use of interagency contract vehicles, including the GSA Schedules, has increased dramatically over the last decade.²²⁷ The Acquisition Advisory Panel²²⁸ acknowledges their role; they “have allowed customer agencies to meet the demands for goods and services at a time when they face growing workloads, declines in the acquisition workforce, and the need for the new skill sets.”²²⁹ Additionally, “interagency contracts allow requiring agencies to meet mission needs while focusing human capital resources on core mission rather than procurement.”²³⁰ FAR 18.105 and 18.112 tout the GSA Multiple Award Schedules, multi-agency BPAs, multi-agency IDIQ contracts, and interagency acquisitions as available “flexibilities” for emergency contracting. They allow a market to emerge,

²²⁶ See Shelley Roberts Econom, *Confronting the Looming Crisis in the Federal Acquisition Workforce*, 35 PUB. CONT. L.J. 171, 190-91 (2006) (“Overall, the total number of federal civilian acquisition personnel decreased 22 percent from 1991 to 2001. Of the remaining civilian acquisition personnel, approximately 38 percent will be eligible to retire by the end of fiscal year 2007.”).

²²⁷ See U.S. Government Accountability Office, HIGH RISK SERIES-AN UPDATE, Report No. GAO 05-207 (Jan. 2005) at 25 (showing Multiple Award Schedules Sales from 1992-2004). Sales grew from \$4 billion to \$6 billion between 1992-1996. Growth accelerated from then until 2004, when sales totaled over \$32.5 billion. *Id.*

²²⁸ It is also known as the SARA Panel. See 14 U.S.C. § 1423 (Pub. L. No. 108-136 (2003) (directing establishment of “an advisory panel to review laws and regulations regarding the use of commercial practices, performance-based contracting, the performance of acquisition functions across agency lines of responsibility, and the use of Governmentwide contracts”). The panel is named for the title: “Services Acquisition Reform Act” or “SARA.”

²²⁹ ACQUISITION ADVISORY PANEL, *supra* note 180, at 21 (quoting GAO’s 2005 High Risk Update).

²³⁰ *Id.* at 20. They also benefit the contract holding agency through fees which support the operational costs of the interagency contract but excess revenues has funded other agency programs. *Id.* at 23.

where those agencies that are able to award and administer contracts do so.²³¹ The service-for-fee arrangement allows the purchasing agency to foot the bill for contracting that its manpower is unable to accomplish.

Those agencies, however, whose primary missions include emergency response and disaster relief cannot rely on other agencies, including the GSA, for all their acquisition needs. Various concerns arise that suggest that centralized agencies are not always the best option for emergency contracting and should only be used as “gap fillers.” First, there are potential gaps between what an agency needs and what is available on interagency vehicles, which raises a risk of out-of-scope orders.²³² Second, centralized IDIQ contracts may have quantity restrictions that probably do not contemplate the full amounts necessary for a major disaster. Third, centralized contracting vehicles are not always good socioeconomic policy tools. The centralized purchasing agencies, such as GSA, may not be able to manage the socioeconomic objectives demanded of their customer agencies, such as local purchasing in the wake of a natural disaster. Fourth, the price mechanisms under a centralized contract may promote fraud or abuse or may otherwise not guard against steep price increases. Fifth, there is significant concern regarding communication and contract administration and oversight when centralized purchasing is used. The Army’s contracting of interrogation services at Abu Ghraib prison through the Department of the Interior illustrates well how

²³¹ See Steven L. Schooner, Feature Comment, *Risky Business: Managing Interagency Acquisition*, 47 No. 14 GOV’T CONTRACTOR ¶ 156 (Apr. 6, 2005).

²³² Out-of-scope means that the order represents a cardinal, or material, change beyond the scope of the contract and therefore should be the subject of a new procurement. See HG Properties A, LP, B-290416, July 25, 2002, 2002 C.P.D. ¶ 128.

easily it is to misuse a centralized contract.²³³ And lessons learned during Hurricane Katrina response indicate a serious breakdown in communication between and among GSA, USACE, and FEMA.²³⁴

Interagency contracting has been under scrutiny by the GAO and more recently, the Acquisition Advisory Panel.²³⁵ GAO placed interagency contracting on its High Risk Areas list in 2004, where it remains today.²³⁶ Federal agencies have responded to the criticisms of the interagency (and specifically the interagency IDIQ system), implementing policies to better safeguard against abuse.²³⁷

C. Benefits of IDIQ Contracts in Disaster Response

1. Pre-negotiated Contract Terms and Conditions Established in Writing

The House Select Bipartisan Committee found that “[i]n the weeks following Katrina, . . . [m]any of the contracts awarded were incomplete and included open-ended or vague terms. In addition, numerous news reports have questioned the terms of disaster relief agreements made in such haste.”²³⁸ The Committee further noted:

FEMA executed few, if any, written contracts during what officials called “the real nightmare emergency” (Aug. 29-Sept. 15). The circumstances surrounding their contract awards made it difficult for FEMA to

²³³ See U.S. Government Accountability Office, INTERAGENCY CONTRACTING: PROBLEMS WITH DOD’S AND INTERIOR’S ORDERS TO SUPPORT MILITARY OPERATIONS, Report No. GAO-05-201 (Apr. 2005).

²³⁴ See e.g., U.S. Government Accountability Office, HURRICANES KATRINA AND RITA: CONTRACTING FOR RESPONSE AND RECOVERY EFFORTS, Report No. GAO-06-235T (Nov. 2005) at 4.

²³⁵ See *supra* note 228.

²³⁶ See *supra* note 4.

²³⁷ See, e.g., Defense Procurement and Acquisition Policy, Interagency Acquisition, <http://www.acq.osd.mil/dpap/specificpolicy/index.htm> (website containing DoD policies).

²³⁸ SELECT BIPARTISAN COMMITTEE, *supra* note 26, at 329. Audits indicate that many were not definitized within the required time period and did not have favorable prices or other terms and conditions.

understand fully the contract specifics. FEMA simply instructed companies to begin work and submit vouchers for payment. FEMA used this method for the acquisition of food, ice, buses, and other supplies. This could raise issues of enforceability, which will need to be resolved when written contracts are issued.²³⁹

One commentator noted: “To fill the gaps, [FEMA] was forced to acquire much of what it needed on the fly, signing deals worth hundreds or millions of dollars with little or no competition when its bargaining position could not have been worse.”²⁴⁰

In contrast, IDIQ contracts’ pre-negotiated contract terms and conditions lessen the uncertainty and confusion that may arise when contracts are incomplete, open-ended or vague. The FAR requires that IDIQ contracts set forth the “statement of work, specifications, or other description that reasonably describes the general scope, nature, complexity and purpose of the supplies or services.”²⁴¹ Agencies and contractors are able to negotiate the terms of the contracts at a time when the government’s bargaining position is strong.

Under standing IDIQ agreements, agencies and their contractors also understand what goods or services are being procured and what is expected of the contractor when a more specific order is issued. Special terms and conditions relative to disasters generally or to specific kinds of disasters or geographic areas

²³⁹ *Id.* at 330.

²⁴⁰ Karelis & Robbins, *supra* note 138, at 1 (quoting Griff Witte, *No-Bid Contracts to Get Close Look*, WASH. POST, Sept. 29, 2005, at A11).

²⁴¹ FAR 16.504.

may be included in the umbrella contract, known to contract holders, and “that would allow for rapid deployment of assistance to affected communities.”²⁴²

Under standing contracts, parties also far better understand the amounts to be delivered. Although the quantities are unknown and delivery schedule uncertain, the government has a realistic, established minimum and maximum of goods and services to be ordered. In the event of a catastrophic event, that maximum may have to be increased through modification of the contract, however the minimum and maximum are pre-established and provide a range of estimated quantities. The exact goods and services (and the amounts) needed for disaster relief, response and reconstruction can only be ascertained after the crisis erupts. IDIQ contracts provide the mechanism for ensuring those goods and services are available to order. Open IDIQ contracts that allow for addition of contractors and items provide an additional safety net for the unforeseen needs that arise.

2. Continuous Competition and Fair and Reasonable Prices

The FAR requires that contracting officers expressly determine that prices are fair and reasonable.²⁴³ This applies to IDIQ contracts as well as the orders under them.

Umbrella contracts are set in place with a preliminary determination that the prices and rates established for the goods and services are fair and reasonable after a competitive

²⁴² ACQUISITION ADVISORY PANEL, *supra* note 180, at 3. FEMA recently awarded six nationwide Individual Assistance-Technical Assistance (IA-TAC) service contracts. The Performance Work Statement (PWS) requires the contractor to maintain the [identified] readiness level and be prepared to provide technical assistance and support in an expedited, safe, and sanitary manner.” See Solicitation No. HSFEHQ-06-R-0030, available at <http://www.fbo.gov/servlet/Documents/R/487240/244184>.

²⁴³ See FAR 13.106-3(a), 15.402(a), 1.404-1.

award or multiple awards.²⁴⁴ The contracting officer then may conduct “mini-competitions” within the IDIQ as he or she issues orders, such that the agency may obtain even better prices or “value” (e.g., terms and conditions) than what was set forth in the umbrella contract.

The IDIQ framework allows for increased competition at the critical period (just before, at or during, and immediately after a disaster or crisis), where unprepared contracting agencies might otherwise turn directly to the more risky sole source contracting. Even if the competition is limited at the order level, it is within the IDIQ framework, where prices are presumptively fair and reasonable price given the prices were competed and established at the umbrella contract level.

3. Fixed Price Contracts and Limiting Cost-Plus and Time and Material Contracts

Federal law favors firm-fixed price contracts over the less desirable cost reimbursement contracts and time and materials (T&M) contracts.²⁴⁵ However, in times of contingency or disaster, much of the contracting is done on a cost-reimbursement or T&M basis.²⁴⁶ The primary concern with T&M contracts is “the FAR rules . . . do not

²⁴⁴ The Acquisition Advisory Panel issued a recommendation “that GSA be authorized to establish a new information technology Schedule for professional services under which prices for each order are established by competition and not based on posted rates.” ACQUISITION ADVISORY PANEL, OFFICE OF THE PRESIDENT, COMMERCIAL PRACTICES WORKING GROUP, at 5, *available at* http://www.acqnet.gov/comp/aap/documents/COMMERCIAL%20PRACTICES_findingsandrecommendations_080906.pdf. This is premised on the belief that pricing for services is requirement specific. This could pave the way for greater flexibility in services contracting and provide for better prices, terms and conditions for orders.

²⁴⁵ T&M contracts are the least preferred of all contract types. This is because “[a] time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency.” FAR 16.601(b)(1).

²⁴⁶ SARA, Section 1432 of the Services Acquisition Reform Act (Pub. L. No. 108-136 (2003)) authorized limited use of T&M contracts. A T&M contract provides for the acquisition of “supplies or services on the basis of (1) Direct labor hours at specified

make efficient or successful performance a condition of payment. The contractor is not obligated to continue performance if to do so would exceed the ceiling price, unless the contracting officer notifies the contractor that the ceiling price has been increased.”²⁴⁷ Therefore, substantial oversight of T&M contracts is necessary,²⁴⁸ but generally not sufficiently available.

Advance planning and commodity (supplies and services) purchases may avoid cost reimbursement contracts and T&M contracts so as to maximize use of fixed price contracts. Because of the uncertainties involved in emergency contracting, there is a tendency to resort to T&M contracts for services. T&M contracts are the proverbial Achilles’ Heel in IDIQ contracts for services. The contractor does not have to bear the risk of incomplete or defective performance. If a deliverable product is attached to the service, it can shift the risk back to the contractor.

In cases where T&M contracts are necessary,²⁴⁹ contracting agencies should ensure that “the contracting officer executes a determination and findings that no other contract type is suitable” and “the contract includes a ceiling price that the contractor

fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and (2) Materials at cost, including, if appropriate, material handling costs as part of material costs.” FAR 16.601(a).

²⁴⁷ ACQUISITION ADVISORY PANEL, OFFICE OF THE PRESIDENT, PRELIMINARY WORKING GROUP DRAFT, COMMERCIAL PRACTICES WORKING GROUP REPORT (Apr. 14, 2006) (Discussion Draft), at 27. “In addition, the Government is required to pay the contractor at the hourly rate, less profit, for correcting or replacing defective services. If the contractor is terminated for default or defective performance, the Government, nonetheless, is obligated to pay the contractor at the hourly rate, less profit, for all hours of defective performance.” *Id.*

²⁴⁸ FAR 16.601(b) (“Appropriate Government surveillance of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used.”).

²⁴⁹ FAR 16.601(b) (“A time-and-materials contract may be used only when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.”).

exceeds at its own risk.”²⁵⁰ During acquisition planning, agencies can hold T&M and cost-plus contracts to a minimum or ensure that appropriate safeguards are included in the terms and conditions to ensure reasonable prices and successful performance.

4. Contractor Pre-qualification of Contractors

IDIQ contracts serve as a means of pre-qualifying contractors before the goods and services are needed. With all contract awards, contracting officers are required to make an affirmative determination of contractor responsibility.²⁵¹ Responsibility includes general standards, dealing with such items as “adequate financial resources,” ability “to comply with the required or proposed delivery or performance schedule,” “satisfactory performance record,” and “satisfactory record of integrity and business ethics,”²⁵² and special standards appropriate for a particular procurement.²⁵³ Therefore, the contract holders are pre-determined to be responsible and able to perform the services or provide the goods when the time arises.

Because needs unexpectedly arise and contractors may need to be added to existing contracts or new IDIQ contracts may need to be established, qualification requirements and other barriers to entry (e.g., electronic funds payment and Central Contracting Registry requirements) may be waived or otherwise reduced. As mentioned previously, “open” IDIQ contracts will only be effective if there are not other obstacles,

²⁵⁰ FAR 16.601(c). Also, the contracting officer shall document the contract file to justify the reasons for and amount of any subsequent change in the ceiling price.” *Id.*

²⁵¹ FAR 9.104.

²⁵² See FAR 9.104-1.

²⁵³ See FAR 9.104-2. “Special standards may be particularly desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate contract performance. The special standards shall be set forth in the solicitation (and so identified) and shall apply to all offerors.” *Id.*

such as barriers to entry.²⁵⁴ Reduction of these barriers will expedite necessary procurement actions.

5. Socioeconomic Objectives

The primary objective for disaster relief and response is to “meet pressing humanitarian needs . . . in an effort to provide immediate relief to survivors and to protect life and property.”²⁵⁵ These include “emergency housing and shelter for victims and emergency personnel, to start debris cleanup, and to secure property from further damage.”²⁵⁶ Congress and the public demand that the local businesses are preferred contractors in relief and reconstruction.²⁵⁷ They also demand that small and small-disadvantaged businesses (local or not) goals and requirements are met or exceeded.²⁵⁸

First and foremost, contracting agencies must have the capability to respond to large, catastrophic disasters anywhere in the nation to meet the humanitarian needs. Given that disasters’ time, location and magnitude are uncertain, some national-level response mechanism is in order.²⁵⁹ FEMA recognized this in its October 2005 announcement of its dual-track strategy.²⁶⁰ In FEMA’s first-track of its strategy (that related to Hurricane Katrina), FEMA awarded 36 contracts, primarily to local, small and small-disadvantaged businesses.²⁶¹ In August 2006, FEMA awarded six national IDIQ

²⁵⁴ See *supra* note 223.

²⁵⁵ SELECT BIPARTISAN COMMITTEE, *supra* note 26, at 329.

²⁵⁶ *Id.*

²⁵⁷ See *supra* Part II.B.5.

²⁵⁸ See *id.*

²⁵⁹ See Developments, *supra* note 11, at ¶ 440.

²⁶⁰ *Id.*

²⁶¹ See *supra* notes 11 and 83 and accompanying text.

technical assistance support contracts after full and open competition.²⁶² FEMA also recognized the ability the “national” contractors would have to meet subcontracting goals and imposed on the contractors the responsibility to “utilize local firms to the maximum extent practical for subcontracting opportunities.”²⁶³ The contract solicitation evaluation criteria included a factor titled “Subcontracting Approach and Socio Economic Business Strategy.”²⁶⁴ Under this factor, large businesses had to submit subcontracting plans with “goals . . . meet[ing] or exceed[ing] the following DHS goals: Small Business (of all types) 40%; Small Disadvantaged Business 5%; Woman Owned Small Business 5%; HUBZone 3%; and Small Disabled Veteran Owned Small Business 3%.”²⁶⁵

As FEMA’s strategy demonstrates, socioeconomic objectives need not be totally abandoned when using IDIQ contracts. Instead, these objectives may be incorporated into the planning and strategy. These goals are secondary during the immediate crisis itself, but need not be dismissed altogether. In fact, an effectively planned multiple award IDIQ contract may allow for the socioeconomic goals to remain at the forefront even during the immediate crisis, secondary only to the most urgently necessities.

Socioeconomic preferences, such as that for local persons or companies, are where the delivery of goods and services crosses paths with the goal of “revitaliz[ing] the

²⁶² See <http://www.fbo.gov/spg/DHS/FEMA/FFMD/Awards/HSFEHQ-06-D-0814.html> (award notice for one of six contract awardees).

²⁶³ See Presolicitation Notice, <http://www.fbo.gov/servlet/Documents/R/487240>. This fulfilled FEMA’s promise it made in October 2005 that it would “require prime contractors to meet significant small business subcontracting goals and abide by Stafford Act preferences for local business use.” Developments, *supra* note 11, at ¶ 440. This track attracted Congressional skepticism as to whether it would, in fact, assist local businesses.

²⁶⁴ See Solicitation, *supra* note 242, at Section L.

²⁶⁵ *Id.*

community by infusions of cash.”²⁶⁶ In other words, contracting with local businesses serves the goal of rebuilding the affected area as well as sustaining the businesses and individuals affected by the disaster.²⁶⁷ There are various ways in which the preferences may be accomplished. First, contracting agencies may establish a price preference for certain “concerns,” such as local companies, small businesses, or minority-owned businesses. Businesses that do not qualify for the preference have a percentage added to the price of their bid or proposal. This ensures contracting officers retain the ability to use larger, out of state, or otherwise non-qualifying companies where the economic disparity in the bids is beyond an acceptable amount. Second, agencies may set aside contracts or orders under multiple award umbrella contracts for local businesses, small businesses, minority-owned businesses, etc., such as under FEMA’s dual-track strategy discussed above. These set-asides may be based on dollar amount, percentage of contracts or orders, functional grouping, or geographic grouping. IDIQ contracts with functional and geographic groupings would allow smaller and/or local businesses to compete for nationwide IDIQ contracts, even though they do not have the ability to provide all the goods or services under the IDIQ contract or the ability to reach across the United States in an economically advantageous way. Finally, as discussed in the next part, subcontracting plans may require socioeconomic considerations.

6. Subcontracting Plans for Larger Businesses

Larger businesses will be a part of the competitive procurement process for disaster-related contracts. In fact, they will likely have the lion’s share of the contracts, because of their technical know-how, familiarity with the government procurement

²⁶⁶ S. Rep. No. 91-1157, at 12 (1970).

²⁶⁷ See *supra* note 77 and accompanying text.

process, and larger reach and surge capability. Experience demonstrates that these large corporations will subcontract significant portions of the work. It is through the pre-qualification process afforded by IDIQ contracting that the larger companies' subcontracting plans can be pre-set, evaluated and approved. These subcontracting plan requirements may be set out in the solicitation and umbrella contract themselves and require the prime contractor to utilize small businesses, local businesses, and/or other concerns.²⁶⁸ The plan would be in place and although there may be unforeseen happenings, the expectations would be expressly written into the contract.²⁶⁹

Agencies' hiring of prime contractors that subcontract the work is an important part of the procurement process. The ability of a large contractor to manage subcontracts, and theoretically, perform the oversight necessary, relieves the stress on contracting agencies. Clearly, the oversight of one large contractor, which in turn manages numerous subcontractors, is more manageable than the direct oversight of dozens or hundreds of smaller contracts. After Katrina, critics complained of instances of contractors having up to five levels of subcontractors and that the subcontractors were earning little more than cost on those contracts while the prime contractor made substantial profit. They also complained that FEMA directed potential contractors to the large contractors to compete for subcontracts, "the effect of [which] was to transfer responsibility for conducting competitions and evaluating proposals from FEMA to the prime contractors."²⁷⁰

²⁶⁸ See *supra* Part IV.C.4 for a discussion of FEMA's dual-track strategy, which required socioeconomic goals as part of the evaluation factors.

²⁶⁹ Critics have complained of the profit schemes of subcontracts as opposed to contracts. One article noted that where the prime contractor received a substantial profit (25%), the subcontractors were barely breaking even. However, with the need to have the resources and surge capability, this must be an integral part of the contracting strategy.

²⁷⁰ Karelis & Robbins, *supra* note 138, at 3.

Therefore, agencies must exercise some restraint while taking advantage of the ability to dictate the required subcontracting plan elements.

7. Orders Limited in Amount and Duration

Katrina contracting demonstrates that where orders are issued or contracts are entered into during the height of an emergency, safeguards are needed.²⁷¹ One important safeguard is strictly limiting orders or contracts in their amount and duration.²⁷² Few contracts or orders need to be issued in which the terms are open, incomplete and/or vague. They should be almost exclusively for a limited purpose, related to the primary objectives of preservation of life, health and safety and preservation of property. The orders may terminate pursuant to their terms or be terminated. “If there is a continuing need for the requirement, the initial contract . . . [could] be left in place[, but] only long enough for a competition to be held. . . . [C]ompetitively awarded contracts [would] then replace the original arrangement.”²⁷³ There is no need to go so far as to competitively award new contracts. Contracting agencies may issue task orders or delivery orders, maximizing the “fair opportunity,” from pre-established IDIQ contracts.

8. Needs of the Contractors: Accounting for Having Goods and Services “at the Ready”

The acquisition process includes pre-solicitation discussions on the government needs and what the commercial marketplace is able to provide. This discussion is essential to effective disaster response contracting. For instance, during the hearings conducted by the House Select Bipartisan Committee, the AshBritt Chief Executive

²⁷¹ This is a lesson-learned from Iraq-related contracting. *See, e.g.*, U.S. Government Accountability Office, INTERAGENCY CONTRACTING: PROBLEMS WITH DOD’S AND INTERIOR’S ORDERS TO SUPPORT MILITARY OPERATIONS, Report No. GAO-05-201 (April 2005).

²⁷² *See* OFPP, *supra* note 104, at 11.

²⁷³ SELECT BIPARTISAN COMMITTEE, *supra* note 26, at 332.

Officer stated, “It costs hundreds of thousands of dollars to keep pre-existing contracts in place, and firms receive no funding for this upkeep, which represents a free insurance policy for USACE, and few companies can secure the bond necessary to perform such a large-scale project.”²⁷⁴ A Department of Homeland Security Spokesman echoed this concern, “caution[ing] that there is a limit to how much a contractor can reasonably be expected to have at the ready. Such preparation costs companies money that they eventually would ask the government to reimburse.”²⁷⁵ IDIQ contracts guarantee a minimum amount (quantity or dollar figure) that contractors will receive, which may serve as a mechanism to compensate contractors for maintaining its capability to have goods and services in place. IDIQ contracts provide a mechanism to set advance contracts and for parties to agree upon terms and conditions that will benefit the government, but also ensure that contractors are able to provide the goods and services with appropriate allocation of risk.

9. Transparency

Hurricane Katrina contracting demonstrated that transparency in contingency contracting was possible and there was no indication that notice of orders and awards detracted from the speed of the acquisitions.²⁷⁶ In response to the media’s demands “to know how the government’s money was being spent . . . agencies such as . . . [USACE and FEMA] used the Internet to announce prime contracts (primarily task- and delivery-

²⁷⁴ *Id.* at 333-334.

²⁷⁵ Renae & Witte, *supra* note 9, at A01.

²⁷⁶ See Yukins, *supra* note 88, at 16 (stating that “the post-Katrina experience showed us that agencies can indeed publish information on task-order awards without disabling the procurement system”).

order contracts) that had been awarded for relief, and, in some instances, the orders that had been issued under prime contracts.”²⁷⁷

10. Acquisition Workforce Relief

A discussion of acquisition reform or improvement is incomplete without reference to the acquisition workforce itself. As alluded to earlier, the acquisition workforce has greatly diminished from its numbers a decade ago.²⁷⁸ As the numbers have declined, the dollars spent by the federal government have increased substantially.²⁷⁹ The lack of experienced personnel hindered Katrina response.²⁸⁰

Clearly, the acquisition workforce is strapped, burdened with contingencies at home and abroad. Unfortunately, no one seems willing to address this concern head on

²⁷⁷ *Id.*

²⁷⁸ See Econom, *supra* note 226, at 190; FEDERAL ACQUISITION INSTITUTE, ANNUAL REPORT ON THE FEDERAL ACQUISITION WORKFORCE: FISCAL YEAR 2005 (July 2006), available at <http://www.fai.gov/pdfs/FAWF2005.pdf>

²⁷⁹ See Sandra O. Seiber & Ronald L. Smith, *Is the Federal Government Contracting Workforce Headed for a Train Wreck?*, CONT. MGMT NEWS (Dec. 2005), available at <http://www.ncmahq.org/publications/cmnews/dec05/Train%20Wreck.asp> (showing that from 1997 to 2004, “DoD workload per person nearly doubled, from \$6.4 million per 1102 staff to almost \$13 million. . . . While the number of contracting actions has remained relatively the same over this period, contract complexity has risen significantly, as have the dollars awarded.”).

²⁸⁰ The House Select Bipartisan Committee found the following:

Before Katrina, FEMA suffered from a lack of sufficiently trained procurement professionals. DHS procurement continues to be decentralized and lacking a uniform approach, and its procurement office was understaffed given the volume and dollar value of work. FEMA’s grossly understaffed acquisition unit was not ready for the Katrina disaster. FEMA had 55 acquisition slots, and procurement officials think it should have had a minimum of 172. Further, only 36 of the 55 slots were actually occupied. FEMA is one of the DHS agencies that are not under the control of the DHS chief procurement officer, thus the FEMA acquisition office reported to Michael Brown. As of the time of the interview, FEMA was relying upon staff from the central acquisition office, comprised of 60 acquisition personnel and led by a member of the Senior Executive Service. Regardless, the office was understaffed.

SELECT BIPARTISAN COMMITTEE, *supra* note 26, at 332.

even in the face of intense criticism. Even with IDIQ contracts' streamlined approach and interagency contracting's "market," agencies *need* contracting officers and staff of their own.²⁸¹ Any remedy that does not include increasing the workforce would be as effective without it. Streamlining the contract formation process can only go so far, especially with the administrative responsibilities once the contracts are in place.

V. CONCLUSION

The IDIQ contracting vehicle is the most vital contracting mechanism available for crisis and disaster response. It has the ability to operate effectively at all stages of disaster-related contracting. It "flexes" as procurement needs arise and objectives evolve and has the ability to incorporate the expectations of the various public voices. The keys to successful IDIQ contracting during disasters are meaningful acquisition planning, commodity and commoditized service commercial items, and simple, open contracts with the ability to add contractors or goods and services at any time during the disaster.

Hurricane Katrina validated the need for effectively planned and implemented IDIQ contracts during disasters and emergencies. However, their extraordinary flexibility has not been realized. By availing themselves of this invaluable acquisition tool, contracting agencies can ensure quick response to disasters, quality products are procured at reasonable prices, the integrity of the process is maintained against charges of cronyism, and socioeconomic objectives are incorporated into the procurement process.

²⁸¹ The Federal Acquisition Institute's July 2006 report shows that federal agencies' acquisition workforce is still very low and diminishing. See FEDERAL ACQUISITION INSTITUTE, *supra* note 278.